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In The

Supreme Court Of The United States

OCTOBER TERM 1961

No. 802

NETTIE SMITH, Appellant

VS.

HUNTER SMITH, Appellee

APPEAL FROM THE FINAL DECREE OF THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA; APPEAL FROM WHICH DECREE WAS TWICE DENIED BY THE SUPREME COURT OF WEST VIRGINIA.

JURISDICTIONAL STATEMENT

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STATEMENT AS TO JURISDICTION

The Appellant, pursuant to United States Supreme Court Rules 13 (2) and 15, files this her statement of the basis upon which it is contended the Supreme Court of the United States has jurisdiction, on direct appeal, to review the final decree and judgment of the Circuit Court of Raleigh County, West Virginia, entered on the 22nd day of January, 1960, which decree and judgment the Supreme Court of Appeals of West Virginia twice refused to review or reverse on, to-wit, the 27th day of June, 1960, and again on the 31st day of October, 1960; that being the final judgment and court of last resort afforded under the procedural laws of the State of West Virginia for review or reversal of said decree.

OPINIONS OF THE COURTS BELOW

There was no formal opinion by the Supreme Court of Appeals of West Virginia in this case. (1) That Court on two occasions denied the relief prayed for by petition and refused to grant appeal. The orders of the Supreme Court so refusing appeal are carried in the appendix to this jurisdictional statement and marked for identification with the style of the case and the words, "First Refusal" and "Second Refusal", respectively. The Circuit Court of Raleigh County, West Virginia, from whose final judgment, the Supreme Court of Appeals of West Virginia refused to grant appeal, filed as a part of the record in the case a statement or opinion. This opinion of the trial court is carried in the appendix to this jurisdictional statement and marked for identification with the style of the case and with the words "Opinion of the Court".

GROUNDS ON WHICH THE JURISDICTION IS INVOKED

THE NATURE OF THE PROCEEDINGS BELOW: This is a chancery suit originally instituted in the Circuit Court of Raleigh County, West Virginia, seeking a decree for

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(1) Under the laws of West Virginia, appeal from the Circuit Court to the Supreme Court do not lie as a matter of right; such appeals are only granted upon petition, and then only in the discretion of the Supreme Court of Appeals. It is the practice in the State of West Virginia in such cases that the Supreme Court, upon denial of appeal and supersedeas so orders on its order book and remand the record and a copy of its order to the trial court. Subsequent applications and petitions may be presented to the Supreme Court of Appeals, at any time within eight months next after the date of the final decree, from which an appeal and supersedeas is sought. After the eight-month period has expired no further application or relief can be had from such judgment in any Court in the State of West Virginia.

separate maintenance by the plaintiff and appellant against her husband, the defendant and appellee. (2) The initial pleading in the case was a simple bill in chancery, setting up the marital relation of the parties and the facts necessary and incident to such an action under the state jurisprudence. (See Original Bill, Trans. 23 to

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(2) The Statute of West Virginia Michie's Code, Section 4727 (Sec. 29, Art. 2 of Chap. 48) provides in part that:

> "Whenever a husband shall, without good and sufficient cause, have failed to provide suitable support for his wife, or have abandoned or deserted her, or if the wife, for such cause as would entitle her to a divorce, is actually living apart from her husband, and such husband is in either case of sufficient ability to support his wife, the circuit court of any county that would have jurisdiction of a suit for divorce between the parties, shall, at the suit of the wife, in chancery, whether or not a divorce be prayed for, decree to the wife as alimony and separate maintenance such sum out of the husband's earnings and income as the court may determine, considering the circumstances of the parties and their stations in life, ***".

In West Virginia, independently of the above statute, it is well established as a part of the common law, that the wife without seeking a divorce, may prosecute a suit in equity for her support and maintenance. (*Lang vs. Lang*, 70 W. Va. 205, 73 S. E. 716). Since the enactment of the foregoing statute, the Court of last resort in the state has liberally construed the statute and held it to be simply a partial declaration of the previous existing common law. The statute is not held to be a limitation, except as to venue upon the power of the Courts of West Virginia to compel the husband to support and maintain his wife. *Huff vs. Huff*, 73 W. Va. 330, 80 S. E. 846. Furthermore, before the enactment of this statute, it was the common law practice for the courts in West Virginia to make reasonable allowances for suit money and attorney fees and separate maintenance pendente lite in cases for separate maintenance. *State vs. Maxwell*, 89 W. Va. 31, 108 S. E. 418; *Snyder vs. Lane*, 135 W. Va. 887, 63 S. E. 2d 483.

28). With the filing of the Original Bill there was filed also a notice of a motion to be made for temporary separate maintenance, suit money and attorney fees, pendente lite. (See T. 29). This notice was returnable on the 1st day of November, 1958. On the return date of this notice, the defendant appeared in opposition to the relief sought on the motion for temporary suit money and temporary maintenance, and exhibited to the Court a certified copy of a decree of divorce, purporting to have been entered in the Chancery Court of Garland County, in the State of Arkansas, on the 12th day of November, 1957, wherein, the husband and defendant in this case was plaintiff and the wife and plaintiff in this case was made defendant and proceeded against by order of publication alone.

The Court of its own motion continued the hearing on said motion and directed the defendant to implead his alleged decree of divorce. (See Order, T. 30 and 31). At a later date, the defendant in the case as directed in said order, appeared and tendered what he denominated a plea in bar, exhibiting with his said plea the same certified copy of the divorce decree which he offered in opposition to said motion for temporary maintenance, etc.

THE ATTACK UPON THE DIVORCE DECREE: The plaintiff, upon the incoming of the so-called plea in bar, asked leave to file an amended bill challenging the validity of said divorce decree and seeking to have the alleged divorce decree cancelled, set aside and held for naught, insofar as the alleged divorce was concerned.

(3) In this amended bill, the plaintiff and appellant alleged that said decree of divorce so exhibited with said plea in bar was void, and among other things, set up and charged that he, the defendant, was not a domiciliary of the State of Arkansas at the time said decree was entered; that he, the said defendant, had gone to the State of Arkansas to fraudulently evade the laws of the State of West Virginia and take advantage of the statutes of Arkansas, to obtain a divorce on mere residence alone for a total of ninety days. (4)

THE DEFENDANT'S ANSWER: At a later date, the defendant filed his answer to said amended bill, (T. p. 40 to 43) denying the allegations of the amended bill of complaint and among other things, alleging and charging his good faith and residence in the State of Arkansas for the lawful time required by Arkansas statute and that said divorce so granted by the Chancery Court of Garland County, in the State of Arkansas, under said statute on residence alone was valid.

NEW DEFENSE CHARGED: This amended answer set up an additional defense and charged that the plaintiff had deserted the plaintiff and refused to live with

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(3) This amended bill so attacking the alleged divorce is not carried into this record, but a second amended and supplemental bill of complaint having substantially the same allegations and seeking the same relief is in the record. We could see no advantage to be gained to any party to the suit by encumbering the record with two amended bills of complaint when from necessity the second amended bill supplanted the first.

(4) This statute is the statute affording direct appellate jurisdiction to this Court. It became effective on the 11th day of February, 1957; it was an amendment to Section 34-1208 of Arkansas Divorce Statutes; it is locally cited in Arkansas as Section 34-1208. The full text of which is carried in the Appendix to this Jurisdictional Statement.

him and because thereof, she was not entitled to separate maintenance as prayed for in her bill of complaint. (T. 40-43, Inc.)

THE PLAINTIFF'S SECOND AMENDED AND SUPPLEMENTAL BILL: When this amended answer to plaintiff's amended bill came in, the plaintiff filed a second amended and supplemental bill of complaint, to meet the new defense of alleged abandonment on the part of the wife. This, the final pleading of attack by the Plaintiff. The second amended and supplemental bill alleged and charged substantially the same matter concerning the matrimonial status of the parties, as was contained in the original and first amended bill of complaint and again charged that the husband was **non domiciliary** of the State of Arkansas and setting out fraudulent intent and scheme to defeat the laws of the State of West Virginia and challenged the alleged divorce on the grounds that the Chancery Court of Garland County, Arkansas, was without jurisdiction; that both the plaintiff and defendant were non domiciliary of the State of Arkansas at the date of said decree, and that the proceeding was by substituted service of process or order of publication, as was previously made in the former bill, which prayed that said decree, insofar as the same purported to grant a divorce be cancelled and held for naught. (T. 44 to 48, inc.)

THE RES ADJUDICATA PLEADED ON THE DEFENSE OF DESERTION: By way of second amendment to said original bill of complaint, to meet the new defense of abandonment by the wife, set up in the defendant's amended answer, the plaintiff in her second amended bill denied that she had abandoned her husband, the defendant, as alleged in the defendant's amended an-

swer. This second amended bill pleaded in bar of the defense of abandonment, a former judgment of the District Court of the United States for the Southern District of West Virginia, wherein, the plaintiff in this case was plaintiff and the defendant in this case was the defendant there. The jurisdiction in this civil case in the United States District Court was based on diverse citizenship. The right of the wife in that case which was instituted on the 27th day of February, 1957, to maintain that suit, on a separate domicile of the wife, was necessarily the issue, at the very threshold of that case. The separation and abandonment in the instant case is alleged in said answer to have occurred on or prior to February 27, 1957, on which date Mrs. Smith instituted the civil action against her husband, for the value of some government bonds belonging to her and converted to his own use by the husband. In this civil action the husband challenged the jurisdiction of the Federal Court and filed a plea of **non domiciliary** on the part of the plaintiff in that civil action and in said plea claimed that Mrs. Smith was on the date of the institution of that civil action, domiciled in the City of Beckley West Virginia. The wife and plaintiff alleged in her complaint in that civil action that she was then, to-wit, on the 27th day of February, 1957, the alleged date of the separation, and for a time prior thereto, a resident and domiciled in the State of Ohio; that the husband and defendant was then on that date a resident and domiciled in the southern district of the State of West Virginia. (T. 57-75)

(5) The United States District Court on this issue decided adversely to the defendant. This decision is conclusive of this issue of the domicile of the parties at that time and the right of the wife to establish a separate domicile; it necessarily finds the separation to be the fault of the husband. There is no contention that these parties ever lived together as husband and wife after that date or that the husband ever sought reconciliation or that this relationship was ever changed.

It was after this decision by the District Court that the defendant in the instant case, and while the above case was pending in the United States Circuit Court of Appeals, for the Fourth Circuit, went to the State of Arkansas, as alleged in the second amended bill, for the purpose of taking advantage of the Arkansas Statute

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(5) Separate Domicile of the Wife: Under the ancient concept of the marital relations, the domicile of the husband for all purposes became the domicile of the wife. This doctrine led to injustice and denied the wife her substantial constitutional citizenship and is no longer recognized by the Courts; it has a limited recognition, subject to equitable and just determination the conduct of the husband may destroy this bond and the wife, who has *justifiably* left her husband and removed to another state, thereby acquires a separate domicile of her own. The separate domicile of the wife is well recognized by the law. She may maintain in her own domicile or elsewhere a suit for separate maintenance, in any state in which she can obtain lawful service of process against her husband to vindicate any personal or property right, she is a citizen with all of the attributes of citizenship *Davis vs. Davis*, 305 U. S. 32, 83 L. ed 26, 118 A. L. R. 1416; *Williamson vs. Osenton*, 232 U. S. 619, 58 L. ed 758; *Barber vs. Barber*, 21 Howard 582, 16 L. ed 226; *Filch vs. Huff*, 218 *Fed.* 17; *Gordon vs. Yost*, 140 Fed. 79; *Hall vs. Hall*, 69 W. Va. 175, 71 S. E. 103, 34 LRA (NS) 758; *Walker vs. Walker*, 109 W. Va. 652, 155 S. E. 903; *Beuhring vs. Beuhring*, 111 W. Va. 135, 161 S. E. 25; *Duesenberry vs. Duesenberry*, 82 W. Va. 135, 95 S. E. 665; *Fisher vs. Fisher*, 81 W. Va. 105, 93 S. E. 1041.

aforesaid, and obtaining the alleged divorce from the plaintiff in this case, on mere order of publication and residence alone.

Indeed, it is a fair and we think necessary inference from the record in the Arkansas case, that the defendant and appellee in his suit for divorce in Arkansas, represented to the Court that he was living in harmony after the separation, but separate and apart from his wife and in consideration of his obligations and duty to support and maintain his wife, **he had agreed to pay to his wife the sum of $300.00 per month, as for separate maintenance.** The Arkansas Court in subsequent decree so finds the fact to be. The whole record of the Arkansas proceeding well nigh conclusively establishes these facts.

PETITION FOR MODIFICATION OF ALIMONY DECREE: On the 7th day of January, 1959, long after this present suit was instituted (6) the appellee went back to the State of Arkansas and there filed his petition in the Chancery Court of Garland County, Arkansas, (T. 88-91, inc.) praying that the Court, "modify and amend the decree heretofore entered herein, with respect to the

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(6) The original bill was filed in the instant case on the 22nd day of October, 1958 and motion for separate maintenance and suit money was made on the first day of November, 1958.

award of alimony in the sum of $300.00". (7)

This decree entered on this petition on the 7th day of January, 1959, recites certain attending and pertinent facts existing at the time of the entry of the original decree. These two decrees issuing from the same court and exhibited with the plaintiff's pleadings and dealing with the same subject matter must, we think, be construed together as one transaction and most strongly against the pleader. This later decree recited that the Federal Court case, above referred to was yet pending in the

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(7) Full Faith and Credit Clause: The County Chancery Courts of Arkansas, such as the Chancery Court of Garland County, are, under the constitution and laws of the State of Arkansas, courts of general equitable jurisdiction having all of the inherent powers of courts of equity and where a husband, *sui juris*, voluntarily invokes the jurisdiction of such Chancery Court in a divorce case, and at his instance induces the court to judicially determine an amount of permanent alimony payable under a separation agreement, payable in monthly installments and the husband defaults in such payments, then such past due accumulated payments are beyond the jurisdiction of the courts of Arkansas to recall and nullify the same; such sums become fixed stable judgments and when the wife subsequently sues in another jurisdiction for her separate maintenance and incidentally seeks such past due awards and prays that they be carried into a judgment in the forum where she institutes her suit as for her separate maintenance, it is the duty of the court of general jurisdiction where such suit is instituted to extend full faith and credit to such judgment and award and enter adequate decrees to carry the same into a judgment in the sister state upon the application of the wife. *Sistare vs. Sistare*, 218 U. S. 1, 54 L. ed 905; *Paul vs. Paul*, 121 Kan. 82, 245 Pac. 1022, 46 A. L. R. 1197; *Lindy vs. Lindy*, 131 U. S. 193, 45 L. ed 810; *Davis vs. Davis*, (U. S.) 83 L. ed 26, 118 A. L. R. 1513; *Sherrer vs. Sherrer*, 334 U. S. 343, 92 L. ed 429; *Coe vs. Coe* 334 U. S. 378, 92 L. ed 1451; 1 A. L. R. 2d 1376; *Kelly vs. Kelly*, (Va.) 87 S. E. 567; *Vanderbilt vs. Vanderbilt*, 354 U. S. 416, 1 L. ed (2d) 1456; *Estin vs. Estin*, 334 U. S. 541, 92 L. ed 1561, 1 A. L. R. 2d 1413.

Circuit Court of Appeals when the original alleged divorce decree was entered; it recites the subsequent successful prosecution of that Federal Court case and the recovery of the value of the plaintiff's bonds, in that suit and that said judgment had been paid by the defendant. This is the only real reason assigned for any attempted modification of that original decree. The only changed condition on which such abatement of alimony was made, was, as the court recites, "the petitioner has approximately Sixty Thousand Dollars less money in assets than he had at the time of the decree and the amount paid his divorced wife, increased her estate by substantiall, a similar amount". (8)

THE ORIGINAL DECREE WAS A CONFIRMATION OF A CONTRACT FOR SEPARATE MAINTENANCE: The decree of attempted modification (Defendant's Exhibit No. 2, T. 88-90, inc.) discloses that the original award of alimony was simply an approval of a contract for separate maintenance and was carried into the original decree of the Arkansas Court at the direction of the plaintiff there and appellee here. This approval of the separation agreement and contract of the parties for separate maintenance was within the general jurisdiction of the Garland County Chancery Court and domicile of the parties was not essential to afford jurisdiction to the Court to adjudicate on that contract. That Court had jurisdiction on that subject, though it had no jurisdiction to grant a divorce.

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(8) This statement of fact is patently not true. The record disclosed that the defendant, at the date of the decree of alleged divorce, had property belonging to his wife of the value of approximately $60,000.00 and the Court gave her judgment *for her property*. When the defendant paid that judgment the true status of his estate was not affected, neither was it reduced nor was her estate increased.

This judgment was final on that question. The decree itself so states. Accordingly, that judgment was beyond the power of the Chancery Court of Garland County, at a later term of that Court, to suspend either the contract or the Court's approval thereof, or to modify said original decree or suspend its operation. **Pryor vs. Pryor,** 88 Ark. 302, 114 S. W. 700, 129 A. S. R. 102; **Bauchus vs. Bauchus,** (Ark.) 227 S. W. 2d 489.

This decree of suspension must necessarily be construed with and as of November 12, 1957, a part of the original decree. This latter decree bears the following significant proof of the above facts. These facts, embodied in that decree are conclusive against the plaintiff who caused its entry, the Court's finding of fact in that decree is in words and figures following, to-wit:

"(3) Now the award of alimony herein was based on certain commitments existing between the parties at the time of the decree. The plaintiff was paying her the sum of $300.00 per month on November 12, 1957, the date of the original decree herein, and the Court so found, and the Court further found that the plaintiff should continue to pay this amount as alimony because the plaintiff proved that same was based on some kind of **contract or understanding existing between them at the time, and further for the reason that this Court found the amount of $300.000 per month alimony to be fair and reasonable, and approved the agreement as**

fair and reasonable." (9) (Emphasis our own)

THE DATE OF THE JUDGMENTS AND DECREES SOUGHT TO BE REVIEWED

(A) The date of the original divorce decree, entered in the Chancery Court of Garland County, Arkansas, in the case of Hunter Smith against Nettie Smith, which is attack in this proceeding, was entered in the Chancery Court of Garland County, Arkansas, on the 12th day of November, 1957.

(B) The decree of modification of said original decree entered in the above styled case and challenged in the instant case, was entered in the Chancery Court

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(9) Courts of general jurisdiction have the power to enter judgments by consent of the parties and a judgment by consent is in effect an agreement or contract of the parties, acknowledged in court and ordered to be recorded with the sanction of the court. It is not essential that the stipulation or consent for entry be in any particular form nor that the judgment itself discloses the fact of agreement or that it is an agreed judgment. This fact may be established by evidence aliud. 30 A Am. Jur., "Judgments", Sec. 144-145; *Bergman vs. Rhodes*, 324 Ill. 137, 165 N. E. 598, 56 A. L. R. 344; *McRay vs. McRay*, 228 N. C. 714, 47 S. E. 2d 27. Provisions of a consent decree may be sustained although they are outside the issues presented by the pleadings. 30 A Am. Jur., Section 146. (See great array of authorities cited in Note 13). *Kelly vs. Milan*, 21 Fed. 842, Same Case, 127 U. S. 139, 32 L. ed. 77.

Furthermore, a judgment by consent being in the nature of a contract should be construed as a written contract duly signed and delivered embodying therein the terms of the said judgment. Such judgments are construed most strongly against the party at whose instance it was entered. It is well settled as a general proposition that a judgment or decree though entered by consent or agreement of the parties is res adjudicata to the same extent as if entered after contest. 30 A Am. Jur., "Judgments", Sec. 149-150; *Carson vs. Shute*, 211 N. C. 159, 189 S. E. 494; *Greeson vs. Greeson*, 208 Okla. 457, 257, P. 2d 276.

of Garland County, Arkansas, on the 7th day of January, 1959, modifying the alimony provision of said original decree of the 12th of November, 1957.

(C) The decree of the Circuit Court of Raleigh County, West Virginia, extending full faith and credit to the above Arkansas decrees and from which this appeal is prosecuted was entered in the Circuit Court of Raleigh County, West Virginia, on the 22nd day of January, 1960.

(D) The first petition to the Supreme Court of Appeals of West Virginia, seeking a reversal of the said Circuit Court of Raleigh County decree, was filed in the Supreme Court of Appeals of West Virginia, on the 12th day of April, 1960. (T. 203) The Supreme Court of Appeals dismissed said petition and refused to review said decree, by its order of the 27th day of June, 1960.

(E) An amended petition and second application, seeking an appeal and supersedeas to the said decree of the 22nd day of January, 1959, so entered in the Circuit Court of Raleigh County, West Virginia, on the 22nd day of January, 1960, was made to the Supreme Court of Appeals of West Virginia, on the 19th day of July, 1960, the same being filed within the period of eight months, in which time the same could be lawfully made, and that Court again dismissed said petition and refused to grant an appeal and supersedeas to said decree, on the 31st day of October, 1960.

(F) The original notice of appeal was filed on, to-wit, the 24th day of January, 1961. (10)

(10) Counsel for the Appellant was uncertain as to the sufficiency of the original notice of appeal and the time for giving and filing of said notice not having expired, he filed within the time for appeal, an amended notice and it is on this notice this appeal is prosecuted.

(G) The amended notice of appeal, together with the service thereof, on counsel of record, was filed in the Office of the Clerk of the Circuit Court of Raleigh County, West Virginia, on the 27th day of January, 1961, that being the Court in which the record of said case was, under the laws of the State of West Virginia properly kept; the Clerk of said court, under the laws of the said state being the lawful custodian of said record.

FINAL PROCEEDINGS AT THE TRIAL

Upon these pleadings, the case went to trial on the 14th day of January, 1960, and the plaintiff, to maintain the issue on her part, presented sundry witnesses and depositions and exhibits, which will be later herein more specifically referred to, and after the plaintiff had so introduced such said sundry witnesses and testimony, in support of her pleadings and rested her case, the following proceedings and motions were made:

BY MR. LYNCH: If Your Honor, please under the provision of Rule 10 of the Rules of Practice in the State Courts, we make the following motion.

THE COURT: First, recite the provisions of Rule 10.

BY MR. HENDERSON: It is to the effect that after plaintiff has rested his case the plaintiff may move for a decretal judgment in his favor and if overruled, does not establish or prejudice his right to put on evidence. I think that is a fair statement of the rule.

BY MR. LYNCH:

The defendant at this time moves the court to direct a decretal judgment in favor of the defendant, Hunter Smith, for the following reasons:

First: The plaintiff has failed to plead the jurisdictional statute of the State of Arkansas, upon which he necessarily relies, has failed to prove it, and without those basic requirements, his evidence is not supported by either pleading or proof. There is no way from the record in its present state that this Court can know what the requirements of the State of Arkansas are as far as jurisdiction over divorce matters is concerned. (12)

Secondly: And without waiving Point No. 1, the Arkansas statute and the case law of that state require only residence for a period of ninety days and not domicile. By the plaintiff's own evidence in this case, a residence for the required ninety days has been shown to have existed and that Hunter Smith was there during the whole of that ninety-day period. It shows that under the Arkansas law, residence for the required sixty days before the institution of the suit has been met and for the required ninety days before the divorce was granted.

Third: All matters adjudicated in the divorce decree of the State of Arkansas in the year 1957, as shown by a certified copy of that decree, now of

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(12) The courts of the State of West Virginia are required to take judicial notice of the statutes and laws of the states of the union. Michie's Official Code of West Virginia, Section Four of Article One of Chapter Fifty-Seven (Serial 5711) provides:

States or of the United States.—Whenever in any case it becomes material to ascertain what the law, statutory or other, of another state or country, or of the United States, is, or was at any time, the court, judge or magistrate shall take judicial notice thereof, and may consult any printed book or other document, purporting to contain, state or explain the same, and consider any testimony, information or argument that is offered on the subject.

record in this case, all those matters are entitled to full faith and credit in this state, except the matter of jurisdiction is proven by the plaintiff's own evidence.

Fourth: There is no evidence in this case upon which this Court could possibly pass any decision as to amount of money to be awarded to this plaintiff for support and maintenance. There is no evidence of the defendant's present income, his worth, or his ability to pay. Without that evidence, the plaintiff has not made out any case and no proper decree could be awarded.

BY MR. HENDERSON:

* * * * * and adding to what Mr. Lynch said as his last ground for his motion for decretal judgment in favor of the defendant, that under the West Virginia statute, money awarded by a Court of this state for separate maintenance and support, by statute, can only be based upon the man's earnings and income, and there has been no evidence adduced for this Court upon which it can make any such money decree if the Court should find that the 1957 divorce decree rendered in the State of Arkansas is not entitled to full faith and credit. As to that decree, we rely upon the Arkansas case of Wheat vs. Wheat, recently decided by the Supreme Court of Arkansas, wherein the residence statute in divorce matters in Arkansas is construed and held to be constitutional, and further in this Court is bound by the interpretation placed on that statute, given by the highest tribunal of that state. **I believe Judge Maxwell, in his theory of the case, has proceeded on domicile. The case of Wheat vs. Wheat expressly distinguishes between domicile and resi-**

dence, and certainly Mr. Maxwell's evidence in the form of a deposition offered in evidence by him that were taken in Arkansas fully confirm and strengthen our position that the jurisdictional requirements have been met in Arkansas, which the Court requires in Arkansas and which appears on the face of that decree, and for that reason, we ask that decretal judgment be entered in favor of the defendant, Hunter Smith, and we are perfectly willing and able to supply the Court with authority in support of our various grounds of this motion, and we ask that it be considered before the defendant is made to go on with his case in answering these allegations in the bill of complaint and the exhibits that have been filed here. (Emphasis ours)

Upon this motion, the trial court in its written opinion, the whole of which is carried in the Appendix to this Statement, among other things, said:

EXCERPTS FROM JUDGE'S OPINION:

"* * * *, but I think there are some West Virginia cases that, perhaps, lead us to what I believe Williams vs. State of North Carolina holds. Although it discusses at great length domicile, I think that Williams vs. North Carolina holds that the testing state will not give full faith and credit to the decrees of the granting state if the laws of that state are contrary to the policy in the State where tested. I come to this conclusion because I find it difficult to believe that the Federal Courts can establish a rule, or rules in relation to matters otherwise domestic that control the domestic acts of the courts of all the states, and it seems to me that, in essence, that is what Williams vs. North Carolina finds; and it seems to me that they held that the policy of the State of North Carolina which at the time of the

Williams decision, was a state in which no divorces were permitted to be granted, and there was obviously a strong state policy against divorce—that they, in effect, held that the State of North Carolina had the right to not extend full faith and credit to the decrees of another state. So, it seems to me what inquiry this Court had to make is what is the policy of the State of West Virginia in regard to divorce decrees of states where the jurisdictional requirements are, perhaps, less strict than those of our own state. There are several cases that have been decided in which some idea of this matter can be gained, although none of them are squarely in point. I found only one, I think, since the Williams vs. North Carolina case was announced. Now, there is a case of Woodford vs. Woodford, in III West Virginia, at Page 116, in which our Court refused to extend full faith and credit to a decree of the State of Ohio. Now, the syllabus in that case says that a decree rendered prematurely in a sister state will not be recognized in this state under the full faith and credit provision of the federal constitution, and in that case, while the notice of publication was run in accordance with statute, the plaintiff made his or her appearance in the Ohio Court before the date stated in the notice of publication. The decree was granted before the expiration date for appearance on the part of the defendant, and for that reason, the Court said that that decree should not be recognized in this state.(13) * * * * "

(13) Manifestly, this case of Woodford vs. Woodford is in complete harmony with Williams vs. North Carolina and inasmuch as the Court of Ohio did not have jurisdiction of the subject matter in the Woodford case, the Supreme Court of Appeals of West Virginia properly refused to extend to it full faith and credit.

The Court continues in his opinion (T. 195) and says:

" * * * * * . Perhaps, the earliest case that seems to indicate the policy in West Virginia is that of Caswell vs. Caswell in 84 West Virginia, at Page 575, where again the syllabus holding, and I think that is the sense of the opinion also, says, "In the absence of any showing of fraud upon the court, **or lack of jurisdiction**, a decree of divorce rendered by a court of competent jurisdiction in another state, duly executed pursuant to the laws of such state or territory, is entitled to the same faith and credit in the courts of his state as in the state or territory wherein rendered. * * * * * " (14) (Emphasis mine)

The Court then proceeding further in his opinions says:

" * * * * * . Nonetheless, I am relying primarily on the recital of the law in Wheat vs. Wheat, decided recently in Arkansas. I take it that I can look to that without any proof by either side, and that case indicates that the Arkansas statute, which provides for residence, was passed recognizing that many people will come to their state and undertake to establish a residence for divorce jurisdiction, and if it were required that they be domiciled there, would perjure themselves; so the State of Arkansas had declared their policy to be that if one is physically present and a resident in Arkansas for the statutory time, they are also domiciled there

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(14). The opinion of the West Virginia Court referred to by the trial court and indeed his own opinion discloses that the Oklahoma Case disclosed *jurisdiction* in the Oklahoma Courts.

for the purposes of Arkansas's law, and I find no fraud practiced on the court of the State of Arkansas by the defendant in this case and no evidence of such. In fact, the plaintiff's evidence is as I say, for all intents and purposes that he was a resident there. (Emphasis mine)

"For the reason, therefore, that it appears that the State of Arkansas had jurisdiction of the person, that being Mr. Smith, and that there is no evidence of that jurisdiction having been obtained by any fraud practice by him on the State of Arkansas, and because the State of Arkansas can be presumed to know whether his residence there was temporary for the purpose of meeting the requirements of their law, he met it, and the State of Arkansas is not deceived by it, and that that decree is bona fide in the State of Arkansas, and it appearing to the Court that all of the cases that I can find which have denied full faith and credit to the decrees of other states have been found also to be faulty in that or some other particular, it seems to me that this is a valid decree of the courts of the State of Arkansas, and being valid is, therefore, entitled to full faith and credit in the courts of this state. * * * * * *".

Pursuant to that opinion the Circuit Court of Raleigh County, West Virginia, sustained said motion on the 22nd day of January, 1960. The decree of the Court after appropriate recitals of the service of process and then filing the sundry pleadings and making up the issue in the case and the recital of the examination of sundry witnesses proceeds as follows:

* * * * *

THE FINAL DECREE: Thereupon the defendant moved the court for a decretal judgment of dismissal of the plaintiff's said bills of complaint and assigned grounds in support of his said motion, as will appear from a transcript of the proceedings had herein, on the 15th day of January, 1960, and the court having heard counsel pro and con respectively on said motion, took the same under advisement until Monday, January 18, 1960, at 9:00 o'clock A. M.

Now, on this the 18th day of January, 1960, at 9:00 o'clock A. M., came again the same parties, and the court announced his opinion and intention to sustain said motion to dismiss this action and thereupon the court proceeded to deliver from the bench, his reasons and opinion upon the matters and grounds assigned in the motion, which said opinion was at the time duly taken by the Official Court Reporter, and, on the motion of the plaintiff, to which there was no objection by defendant, the same is to be transcribed by the Official Reporter, and the same is hereby made a part of the record herein; the same to be identified with the words at the caption, "In the Circuit Court of Raleigh County, West Virginia", and followed by the style of the case, "Nettie Smith vs. In Chancery, Hunter Smith", and the words, "Ruling of the Court on the Motion to Dismiss this Action"; and duly signed by the presiding Judge, to which rulings of the Court the plaintiff objected and excepted.

Wherefore, this court doth now here order and decree that the decree of absolute divorce between Hunter Smith and Nettie Smith, heretofore rendered by the Chancery Court of Garland County, State of Arkansas, in that certain divorce action then there-

in pending, styled, "Hunter Smith, Plaintiff, vs. Nettie Smith, Defendant, No. 31501", entered in said court on the 12th day of November, 1957, and of record in the office of the Clerk of said Court in Chancery Record, Vol. 62, at Page 12, is entitled full faith and credit by the Courts of the State of West Virginia, and it is hereby accorded full faith and credit by the Circuit Court of this Raleigh County, West Virginia, and now the court doth further adjudge, order and decree, that the plaintiff, Nettie Smith, has failed to present any evidence of the earnings and income of the defendant, Hunter Smith, upon which the court could in anywise decree a monetary sum for the support and maintenance of the said Nettie Smith as prayed for in her said bill of complaint, to all of which rulings of the court the plaintiff, Nettie Smith, at the time objected and excepted, but the court overruled said objection and exceptions.

It is, therefore, adjudged, ordered and decreed, that the plaintiff's cause of action herein be, and the same is, hereby dismissed, and that the plaintiff do pay unto the defendant his costs in and about the prosecution of his defense in this behalf expended, to which ruling of the Court the plaintiff objected and excepted."

THIS STATUTORY PROVISION BELIEVED TO CONFER ON THIS COURT JURISDICTION OF THE APPEAL:

The Statute affording appellate jurisdiction to the Supreme Court of the United States upon this appeal

and on this appeal invoked is 28 U. S. C. A., Sec. 1257 (2). (15)

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(15) Frankness compels us to say that we have some difficulty with reference to the jurisdiction of this Court, by direct appeal on the one hand and by petition for writ of certiorari on the other. In cases involving the validity of States Statutes, other than the statutes of the forum of the decision appealed from, the question is compounded with the full faith and credit clause. This constitutional provision of full faith and credit is usually invoked by certiorari. The instant case presents a decision of a lower Court, affirmed by the Supreme Court of Appeals of West Virginia, holding valid a challenged foreign statute. The language of Section 1257 (2) specifically provides, we think, for cases which draws in question the validity of a statute of *any state* etc. (Emphasis ours) The Arkansas statute is in direct conflict with the constitution of the United States as construed by this Court in Williams vs. North Carolina, 325 U. S. 226, 89 F ed. 1577, 157, A. L. R. 1366. We do not understand, however, that U. S. C. A. 1257 (2) necessarily demands for jurisdictional purposes the challenge of a statute of the state of the forum which sustains the statute against the challenge of its constitutionality. We think the statute of a foreign state, on which the decision appealed from is based, is within the contemplation of 28 U. S. C. A. 1257 (2). If we are in error as to the invoked statute affording the jurisdiction of the Supreme Court of the United States, then under the circumstances of this case, we are of opinion that this proceeding would be sustained by the Supreme Court of the United States, under the authority of 28 U. S. C. A. 2103. *May vs. Anderson*, 345 U. S. 528, 97 L ed. 1221; *Bank of Wichita, Kansas vs. Lamb*, 337 U. S. 38, 93 L ed. 1190; *Morris vs. Jones*, 329 U. S. 545, 91 L ed. 488, 168 A. L. R. 656; *Charleston Savings and Loan Assoc. vs. Alderson*, 324 U. S. 182, 89 L ed. 587; *Commonwealth of Pa. vs. Board of Directors*, 353 U. S. 230, 1 L ed. 2d 792.

CASES TO SUSTAIN JURISDICTION (12)

The principals of law and the cases believed to sustain the Court's jurisdiction are:

(A) AS TO FINALITY OF STATE PROCEEDINGS: this Court has repeatedly held that a denial of review of the judgment of an inferior court by the court of last resort of a state, is a final judgment within the contemplation of law for appellate purposes demanding finality of the judgment of the Court of last resort. **Atchinson-Topeka-Santa Fe Railway Company vs. Public Utilities Commission,** 346 U. S. 346, 98 L ed 51; **American Railway Express Company vs. Levee,** 68 L ed 104, 263 U. S. 19; **Andrews vs. Virginian Railway Company,** 63 L ed 236, 248 U. S. 272; **Pope vs. Atlantic Coastline Railway Company,** 345 U. S. 379, 97 L ed 1094; **Virginia Railway Company vs. Mullins,** 271 U. S. 221, 70 L ed 915; in such cases the judgment of the inferior court is properly reviewable by the Supreme Court of the United States. **Western Union Telegraph Company vs. Priester,** 276 U. S. 252, 72 L ed 555; see monographic note 4, page 559.

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(12) We are confused in the interpretation and application of this title of this rule. Surely this rule contemplates a statement of the principles of law, the cited case is supposed to sustain, though some of the forms we have examined do not so construe or apply this rule. For purposes of clarity, we have adopted the form as indicated.

Furthermore, under Subdivision c (1) of Section 1 of Rule 15, it is provided that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised thereon". We have presented some principles and cases to sustain them, which are not strictly applicable to the question of the constitutionality of the Arkansas statute, yet, "these subsidiary questions are fairly comprised" in the jurisdictional question and we felt that the statement of these principals and the collection of these authorities to sustain them would be helpful to the Court.

(B) SCOPE OF CONSTITUTIONAL LEGISLATIVE POWER IN THE MATTER OF DIVORCE: It is beyond the scope of State Legislative power to enact statutes vesting in the courts of the state general jurisdiction and authority to render judgments and decrees of divorce in the absence of the domicile of either the plaintiff or defendant. **Williams vs. North Carolina,** 325 U. S. 226, 89 L ed. 1577, 157 A. L. R. 1366; **Alton vs. Alton,** 207 Fed. 2d. 667; **Hood vs. State,** 56 Ind. 263; 26 Am. Rep. 21, see extended monographic note; **Litowich vs. Litowich,** 19 Kans. 451, 27 Am. Rep. 145; **Jenkins vs. Jenkins,** (Ala.) 36 So. 2d 236, 3 A. L. R. 2d 662, see monographic note P. 666; **People vs. Dowell,** 25 Mich. 247, 12 Am. Rep. 260; **White vs. White,** 105 Mass. 325, 7 Am. Rep. 526; **Bank of the State, etc. vs. Cooper,** 2 Yerger 599. 24 Am. Dec. 517; **Simonds vs. Simonds;** 108 Mass. 572; in re: Christenson, 17 Utah 412, 70 A. S. R. 792; **May vs. Anderson,** 345 U. S. 528, 97 L. ed 221, (dissenting opinion Mr. Justice Jackson); **Sherrer vs. Sherrer,** 334 U. S. 343, 97 L ed 1229-1439 (dissenting opinion Mr. Justice Frankfurter); **Wheat vs. Wheat,** 318 S. W. 2d 793, (dissenting opinions); 17 Am. Jur., "Divorce and Separation", Sec. 280.

(C) DIVORCE COURTS—JURISDICTION: There are no courts in this nation which can be regarded as successors to the jurisdiction of the Ecclesiastical Courts of England, there is no common law divorce. The power to grant a divorce is not within the general and inherent jurisdiction of the courts of the several states. Domicile of at least one of the parties to a divorce suit is indespensible and unless affirmatively, both alleged and proven, the judgments of such courts are void and even when domicile of the plaintiff is both alleged and proven and the case is prosecuted on constructive service alone, the force of the decree is limited to the exterior boun-

daries of the state of the forum and the judgment so rendered does not demand full faith and credit in any other state. 17 Am. Jur., "Divorce and Separation", Sec. 275, page 453; 12 Eng. Rul. Cas. page 850, monographic note; **Williams vs. North Carolina, Supra; Armstrong vs. Armstrong,** 350 U. S. 568, 100 L ed 705; **Vanderbilt vs. Vanderbilt,** 354 U. S. 416 1 L ed 1456; **Estin vs. Estin,** 334 U. S. 541, 92 L ed 1561, 1 A. L. R. 2d 1412; **Pennoyer vs. Neff,** 95 U. S. 714, 24 L ed 565; **Slapp vs. Slapp,** 143 O. St. 105, 54 N. E. 2d 153; **Cox vs. Cox,** 19 0 St. 502, 2 A. L. R. 415; **McGill vs Demning,** 44 O. St. 644; 11 N. E. 118; **Woods vs. Waddell,** 44 O. St. 449, 8 N. E. 297; **Bennett vs. Bennett,** 137 W. Va. 179, 70 S. E. 2d 894; **Wooten vs. District Court,** 189 Pac. 233, 9 A. L. R. 1212.

THE QUESTIONS PRESENTED BY THE APPEAL ARE:

(A) Whether the jurisdictional divorce statutes of Arkansas, "an act to amend Section 34-1203 Arkansas Statute" locally referred to in the State of Arkansas as, "Act 36 of 1957", as construed by the Supreme Court of the State of Arkansas, in the case of **Wheat vs. Wheat,** 318 S. W. 2d 793, is valid and constitutional; whether the constitution and laws of the United States as determined and construed in the case of **Williams vs. North Carolina,** 325 U. S. 226, 89 L ed 1577, is the law of the land or, on the other hand, shall the domestic relations of the citizens of the nation be determined on the basis of the foregoing Arkansas statute as construed in the case of **Wheat vs. Wheat,** 318 S. W. 2d 739.

(B) Whether the jurisdictional divorce statute of Arkansas, "an act to amend Section 34-1203 Arkansas Statute", locally referred to in the State of Arkansas as, "Act 36 of 1957", as construed by the Supreme Court of the State of Arkansas, in the case of **Wheat vs. Wheat,**

318 S. W. 2d 793, is such public acts, records, and judicial proceedings of the State of Arkansas, within the contemplation of the full faith and credit provisions of the Federal Constitution and the acts of the Congress of the United States enacted pursuant thereto, as demands their recognition and enforcement in other states of the union and compels the Courts of other states to enforce or extend to such acts, judgments and decrees made under the authority of said statute, full faith and credit.

(C) Whether the states of the union are vested with and enjoy that degree of sovereign power and authority which enables each state, within the confines of its own borders, pursuant to its own purpose and through the decrees of its courts, to destroy and dissolve the matrimonial contractual relationship of the husband and the wife, regardless of the domicile concept of the citizenship which has heretofore always necessarily adhered to the matrimonial and citizenship status of the citizens of the United States.

(D) Whether the states of the union are vested with that degree of sovereign power and authority which enables each state, within its own confines of its own borders, pursuant to its own purposes and through the decrees of its own courts to destroy or dissolve the matrimonial contractual relationship of the husband and the wife in the absence of either.

(E) Whether a divorce decree entered by a Court of general jurisdiction in one of the states of the union and in accordance with the laws of the state of the forum, in a suit prosecuted by the husband against the wife, in the absence of the wife and on whom no personal service of process was obtained, is valid as a defense as against the vested matrimonial rights of the

wife, to separate maintenance in an action prosecuted in another state by the wife against the husband, on whom personal service of process is had, and the decree entered in the former case is introduced in evidence and relied upon as an absolute defense.

(F) Whether a divorce decree entered by the courts of general jurisdiction in the State of Arkansas, and granting a divorce to the husband in a suit prosecuted there by him and he was personally within the jurisdiction of that court and in attendance thereon, which decree bears a consent judgment, payable in monthly installments of $300.00 per month to the wife and under which decree there has been an accumulation of unpaid installments, then and under such circumstances, are said installments or deferred and accummulated payments, judgments of the State of Arkansas and entitled to the constitutional full faith and credit, in a suit instituted by the wife in the State of West Virginia, having for its purpose, among other things, the collection of such said deferred payments by the wife.

(G) Whether a divorce and alimony decree is valid and enforcible in another state which was granted in the State of Arkansas to the husband in which there is lawfully (16) carried into said decree of divorce a consent award of $300.00 per month as for alimony or separate maintenance of the wife and the wife later instituted in the Circuit Court of Raleigh County, West Virginia, a suit among other things, for the collection of said several monthly payments, there-

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(16) Under the laws and public policy of the State of Arkansas, the Courts of that State may, in their discretion grant separate maintenance or alimony to the wife, even though the husband is adjudged entitled to the divorce, because of the misconduct or fault of the wife.

after to accrue, and prayed of the Circuit Court of Raleigh County, West Virginia, that said several sums of money so ordered to be paid be embodied in the decree of the Circuit Court of Raleigh County, West Virginia, wherein the wife sought a judgment for such said maintenance.

(1) Was such decree and award of alimony, such a judgment, in the State of Arkansas, as entitled the wife to enforce it in the State of West Virginia under the laws of comity and under the full faith and credit clause of the Federal Constitution of the United States?

(2) Does the Constitution of the State of West Virginia, Section 17 of Article 3, confer jurisdiction on the Courts of the State of West Virginia, and indeed, prescribed the duty of such Court to enforce such said alimony decrees so made in another state?

(3) If under such circumstances, the Courts of the State of West Virginia grant full faith and credit to the divorce decree as aforesaid, of Arkansas, insofar as the same granted the husband a divorce, does it not necessarily follow that said decree, under the Constitution of the State of West Virginia, at the suit of a citizen of Ohio, should be granted the same full force and effect, insofar as the same awarded the alimony in said case?

(4) Is it not a denial of the equal protection of the laws of the State of West Virginia, to the citizen of Ohio, in the instant case, to refuse to carry out the spirit and indeed, the letter of the West Virginia Constitution aforesaid, and a violation of the Fourteenth Amendment to the Constitution of the United States for the Circuit Court of Raleigh County, West Virginia, to refuse to enforce the lawful decrees of the State of Arkansas in re-

lation to alimony and separate maintenance, which decree of refusal the Supreme Court of the State of West Virginia refused to review or reverse?

A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Under this title, to avoid repetition, it seems to be necessary that we direct the court's attention to the facts developed on the pleadings and hereinbefore stated under Subdivision (1) and (1-i) of Section 1 of Rule 15, appearing on pages 2 to 9 of this Statement.

The plaintiff and defendant are husband and wife. This relationship has existed with many interruptions, since 1916. The plaintiff in this case has suffered much indignity at the hands of her husband. She, of course, at her age, is vitally interested in maintaining her marital relationship; she has earned this reward by the maintenance of a decent and reputable womanhood. In all of her many humiliations, there has never been any claimed infidelity, or a single charge against her moral character.

Mr. Smith and Mrs. Smith were legally married to each other on the 14th day of September, 1916, in the County of Wood, in the State of West Virginia. They lived together as husband and wife until the 7th day of April, 1941, when the defendant in this case, Hunter Smith, instituted a chancery suit in the Circuit Court of Raleigh County, West Virginia, seeking, among other things, a divorce on the alleged grounds of cruelty, from the bonds of matrimony, then existing between the plaintiff, Nettie Smith, and her husband, Hunter Smith.

In March 1942, the Circuit Court of Raleigh County granted the prayer of that bill. The wife prosecuted to the Supreme Court of Appeals of West Virginia, an appeal from said decree, and on the 23rd day of March, 1943, the Supreme Court of West Virginia reversed said decree of divorce and remanded the case to the Circuit Court of Raleigh County, West Virginia, to be further heard therein, in conformity with the opinion rendered. (See **Hunter Smith vs. Nettie Smith,** 125 W. Va. 89; 24 S. E. 2d 902). This 1942 case was finally dismissed without any decree granting any relief to either party, but it was not dismissed until after the husband, Hunter Smith, had gotten a decree of divorce, in a foreign jurisdiction.

After the decision of the Supreme Court of Appeals of West Virginia, in the above case, Hunter Smith went to the State of Arkansas, and while said chancery suit was still pending in the Circuit Court of Raleigh County, West Virginia, on the 28rd day of March, 1943, and there instituted immediately a fraudulent suit for divorce in the Chancery Court in the County of Washington, in the State of Arkansas. This proceeding was had before the enactment of the present Arkansas divorce statute. The law of Arkansas, at that time, required to be alleged and proven an appropriate domicile. In that case, Mr. Smith fraudulently alleged in his bill of complaint that he was then domiciled in said county and state of Arkansas. Mrs. Smith, despairing of her plight and under economic pressure, went to the state of Arkansas and procured from Mr. Smith a voluntary property settlement which was carried into a decree in said divorce suit, settling certain property rights between she and her husband, among other things, he agreed to pay her $150.00 per month as permanent alimony; this he later voluntarily increased to $300.00

per month. The plaintiff in that suit, Hunter Smith, took a decree of absolute divorce. He later testified in the civil case that he had always been domiciled in Raleigh County, West Virginia. In his endeavors for reconciliation he repeatedly told his wife that decree of divorce was void.

Mr. Smith and his wife thereafter lived separate and apart until about the year 1947, at which time, Hunter Smith, declared said Arkansas divorce to be invalid and began to seek a reconciliation of their former marital relation, which reconciliation was vigorously prosecuted by Mr. Smith, attended with most affectionate demonstrations of devotion and attended with lavish expensive gifts, including vacations in southern climates and other persuasive and convincing demonstrations. (See Testimony Mrs. Smith T. 172-178 inc.) By this means, Mr. Smith procured a reconciliation and a resumption of the marital relation with his wife, Nettie Smith, the plaintiff in this suit. The plaintiff and defendant thus became totally reconciled.

In the meantime, Mr. Smith had been married to a woman alleged by Mrs. Smith in the West Virginia divorce case in 1941, to be the co-respondent. Mr. Smith's haste to procure the first Arkansas divorce was stimulated by his courtship with this woman. From this woman, Mr. Smith later obtained a divorce. This proceeding was prosecuted and terminated about the time of the reconciliation, with his former wife, the plaintiff in this case. In an abundance of precaution and to avoid reasonable anticipation of distasteful gossip, the plaintiff and defendant, on the 18th day of August, 1953, in the County of Clark, in the State of Arkansas, again solemnized their second marital relation and were there again re-

united in the bonds of holy matrimony. The parties to this suit then returned to Beckley, West Virginia, to resume their cohabitation as husband and wife and lived and cohabited together as husband and wife in Raleigh County, West Virginia, until the 27th day of February, 1957.

Mr. Smith is a man of great wealth and as an incident to his wooing Mrs. Smith, to accomplish the reconciliation, gave to his wife, Nettie Smith, Fifty Thousand Dollars in United States Government Bonds. Some three or four years passed in reasonable happiness and domestic tranquility but a controversy arose between them as to the ownership of these bonds. Mr. Smith had a key to the safety deposit box at the bank where Mrs. Smith had put the bonds for safe keeping. The bonds were placed in that box before this second marriage. After this marriage, Mr. Smith took those bonds from her safety deposit box and converted them to his own use. This resulted in separation and litigation. The ownership of these bonds was litigated in the United States District Court for the Southern District of West Virginia. On the issue of ownership of these bonds, the District Court held adversely to Mrs. Smith. The Circuit Court of Appeals for the Fourth Circuit reversed the District Court and ordered judgment for Mrs. Smith (See **Nettie Smith vs. Hunter Smith,** 253 F 2d 614). The defendant, Hunter Smith, so conducted himself in such spiteful and unpleasant manner that Nettie Smith was compelled to absent herself from him. She went to Syracuse in the State of Ohio, and there established a new domicile. Mrs. Smith invoked the jurisdiction of the Federal District Court in that controversy on diversity of citizenship; this question of jurisdiction was litigated in that case. The District Court sustained the domicile of Nettie Smith and neces-

sorily held that she was without fault in her separation from Mr. Smith. The defendant, Hunter Smith, however, during the time of this separation and litigation, contributed under contract to Mrs. Smith's support monthly advances of $300.00 per month for her support and maintenance, until after the adverse decision of the Circuit Court of Appeals. It was not until after that case was decided adversely to him, by the Circuit Court of Appeals that Mr. Smith ceased making such payments and refused thereafter to recognize his marital duty to maintain his wife. He went to the State of Arkansas and there procured the divorce here in question, under the provisions of the Arkansas Statute; this has been approved both by the Circuit Court of Raleigh County, West Virginia, and in effect twice affirmed by the Supreme Court of West Virginia.

TOTAL LACK OF PROOF OF DOMICILE CONDEMNS DECREE: The whole of the testimony in this record is to the effect that Hunter Smith was never, in fact, domiciled in the State of Arkansas. His pleadings filed to challenge the jurisdiction of the United States District Court conclusively established that he was on, to-wit, the 27th day of February, 1957, domiciled in the City of Beckley, in Raleigh County, West Virginia. (See T. 61-68, both inclusive)

Mrs. Smith introduced sundry witnesses to prove domicile of Mr. Smith in Raleigh County, West Virginia, over a long period of years.

Roy D. Millyon, Vice President of the Raleigh County Bank, (T. 129-139) testified that he had known Mr. Smith for more than thirty years as a customer in his banking institution and that he lived here at Beckley, West Virginia during all of that time.

Sam Turner, Cashier of the Beckley National Bank (T. 142-156, both inclusive) testified that he had known Mr. Smith as a business customer of that bank and as a resident of this Raleigh County, West Virginia, for more than thirty years.

The Assessor's Office for Raleigh County, West Virginia, (See testimony of Earl Frazier, T. 156-162) disclosed that Mr. Smith had entered his personal property in Raleigh County, West Virginia, for taxation and on his assessment had obtained his automobile license for the operation of his automobile, in the State of West Virginia, for the year 1957.

The Sheriff's Office (See the testimony of Tracy Riffe, T. 162-165) disclosed that Mr. Smith had paid the taxes on his personal property assessment, in Raleigh County, West Virginia, which enabled him to procure his West Virginia automobile license.

The records of the Post Office at Beckley, West Virginia, (See testimony of A. Fray Lilly, T. 123-127) disclosed that Mr. Smith for many years past had maintained his post office address at Beckley, West Virginia, and maintained a depository box in the Post Office for which he paid annually a special fee. That Post Office box was Number 1490. To this address he personally had his mail both forwarded and delivered.

A most significant piece of testimony is that of Brantly Barr (T. 127-129) the business manager for the Chesapeake and Potomac Telephone Company at Beckley, West Virginia. The uncontradicted testimony in this case is that Mr. Smith's Beckley, West Virginia, street address is 2302½ South Kanawha Street. On the 6th day of August, 1957, he had installed at that residence a telephone. (T. 128) It will be recalled that the civil suit above referred to was then pending in the United

States District Court, and that case was tried and resulted in a verdict in favor of Mr. Smith, and that suit was dismissed on the 25th day of July, 1957, (T. 68). Notice of appeal in that case was filed on the 29th day of July, 1957. Just seven days after that notice of appeal was given, Mr. Smith had this telephone installed in his home at Beckley, West Virginia. Just three days later (T. 128) on the 9th day of August, 1957, Mr. Smith had the service of that telephone temporarily suspended. This was a temporary suspension of this telephone in his residence. It was suspended just during the period that Mr. Smith spent in Garland County, Arkansas, to obtain his divorce. He obtained his divorce and checked out of his hotel, on the 12th day of November, 1957. The service of this telephone was resumed two days later, on the 14th day of November, 1957; two days after the entry of his divorce decree in the Chancery Court of Garland County, Arkansas, on the 12th day of November, 1957, (See T. 128) he was back in Beckley, West Virginia, connecting his telephone in his home at 2302½ South Kanawha Street, Beckley, West Virginia.

NATURE OF RESIDENCE OF MR. SMITH IN ARKANSAS: Mrs. Smith, to prove the fraud in this case, by her counsel, went to the State of Arkansas and took the deposition of J. E. Lewis (T. 92) and sundry other witnesses. Mr. Lewis was the Executive Assistant Manager of the Majestic Hotel at Hot Springs, Arkansas, and had enjoyed that position since the 31st day of May, 1946. Mr. Smith, the defendant in this case, was a guest in that hotel, during his sojourn in Arkansas. Mr. Smith arrived there on the 8th day of August, 1957. He registered and gave his residence as 2302½ South Kanawha Street, Beckley, West Virginia. He departed from that hotel on the 12th day of November, 1957, the same date on

which his divorce was granted. He left his forwarding address, his post office Box 1490, Beckley, West Virginia. He returned to Beckley and resumed his telephone connection two days later. In other words, Mr. Smith was a resident of Garland County, Arkansas, for a total of 94 days in the Majestic Hotel at Hot Springs, Arkansas for the sole purpose of obtaining a quick divorce.

With the deposition of Mr. Lewis, the plaintiff filed a photostat copy of the registration of Mr. Smith while he was such guest, from which it appears that he registered in his own handwriting and gave his residence as 2302½ South Kanawha Street, Beckley, West Virginia. He paid his expenses at that hotel as disclosed by the exhibit filed with the testimony of Mr. Lewis, (T. 96-99) by checks drawn on his resident bank, The Beckley National Bank of Beckley, West Virginia. This fact was established by the checks or cancelled vouchers. Thus, Mr. Smith maintained his business connection at Beckley, West Virginia, and his divorce proceeding at Hot Springs, Arkansas. When Mr. Smith checked out of his hotel at Hot Springs, Arkansas, on the 12th day of November, incidentally, the same date on which his divorce was granted, he gave to that institution his forwarding address as Box 1490, Beckley, West Virginia. (See stipulation of counsel, T. 107)

Mrs. Smith took the depositions of every banker in Hot Springs, to-wit, Betty Greenlee and Howard Sublett, from which it appears that Mr. Smith had no banking connections with any financial institution in the State of Arkansas, with the single exception of a note that was filed with Mr. Sublett's bank for collection in December, 1959, a little more than a year after his alleged divorce. This has all the earmarks of after thought. The facts attending this transaction are significant. The note was

filed there for collection by a patron of the bank in December, 1958. The bill was filed here in West Virginia in the instant case on the 22nd day of October, 1958; something had to be done to lend color to that divorce. It would appear that this was an installment note and the installment payments had been met, not by Mr. Smith personally, but by the same counsel who represented Mr. Smith in his divorce case. These payments, it would appear, are very small. These payments were made as for Mr. Smith by his counsel. (T. 113) What the character of this transaction is we do not have any more information.

HOT SPRINGS HAS NO POSTAL RECORD: It was stipulated that if the Post Master at Hot Springs, Arkansas, was examined he would testify that he had access to the post office records of Hot Springs and that he had checked the said records and that there is no record of post office service for Hunter Smith during the period of August 8th, 1957, to December 31, 1957.

SIGNIFICANT DATES: By stipulation of counsel it is proven that Mr. Smith instituted his suit for his divorce in the Chancery Court of Garland County, Arkansas, on the 9th day of October, 1957, the next day after his sixty day residence. (T. 115) It is significant that this date affords exactly sixty days of residence before the institution of his suit as required by the Arkansas statute. The timing was perfect.

TAXATION IN ARKANSAS: Mrs. Smith also took the deposition of the Tax Collector of Arkansas, Ray Owen, and she proved by this witness that Mr. Smith was not assessed with any property in Garland County, in the State of Arkansas. (T. 117)

Furthermore, Mr. Smith did not pay a poll tax, required under the laws of the State of Arkansas, to enable him to vote in that state for the years 1956-57-58. (T. 107) There was entered in that county for taxation on the 22nd day of September, 1959 (T. 108) in accordance with a deed dated November 11, 1958, more than a year after his divorce, from C. C. Lacy to Hunter Smith. The valuation of this property or the nature of this transaction is not disclosed, except that it did not occur till after that divorce decree had been attacked in the instant suit. That divorce decree needed color, it was being attacked.

THE EARNINGS AND INCOME OF THE DEFENDANT: It is significant in this case that the trial court could not find enough testimony in this record of the earnings and income of the husband, on which to base a decree for separate maintenance, yet, the uncontradicted testimony and the records of the institutions in which Mr. Smith did his business, discloses that from January 1957 to January 1959, the defendant, Hunter Smith, had an income which he deposited in the Beckley National Bank to his checking account of $140,360.32, and during the time January 1957 to December 1959, he deposited in the Raleigh County Bank in Beckley, West Virginia, the sum of $7,261.64. In other words, in the two years period immediately proceeding the final decree in this case, Mr. Smith had an income of $147,621.96. We respectfully inquire how else could the income of Mr. Smith have been proven? This income would certainly warrant a separate maintenance, at the very least, equal to the consent decree by which we insist Mr. Smith is irrevocably bound. We submit that so much of the judgment of the Circuit Court of Raleigh County appealed from as states, "Nettie Smith, has failed to present any evidence

of the earnings and income of the defendant, Hunter Smith, upon which the Court could in anywise decree a monetary sum for the support and maintenance of the said Nettie Smith as prayed for in her said bill of complaint", is elusive, evasive and wholly unwarranted by the record — to so hold is to close the eyes and ears of the Court to the facts of the case and deny the plaintiff, not only justice but due process of law for the vindication of her just rights.

FURTHER DEMONSTRATION OF DOMICILE: Furthermore, it is significant that at the very time Mr. Smith was housed in the Majestic Hotel at Hot Springs, Arkansas, his business and deposits were conducted in Beckley, in Raleigh County, with a regularity indignitive of personal intervention and prosecution of his business. Thus, he arrived at this hotel at Hot Springs, Arkansas, on the 8th day of August, 1957. On the 23rd day of that month he deposited $500.00 in the Beckley National Bank. On the 31st day of August, 1957, while he was at that hotel, he deposited $1,200.00 in the Beckley National Bank and while he was yet housed in that hotel at Hot Springs, he deposited again in that bank $2,900.00. On the 20th day of September, 1957, he deposited in the same bank $1,150.00 and again on October 26, while he was in that hotel he deposited in that bank, $1,150.00 and again on November 14th, 1957, two days after his divorce was granted, he had returned to Beckley, West Virginia and deposited in that bank, $1,400.00. During all this time he was paying his current expenses at that hotel by checks drawn on this account.

Now to repeat, it was on the 8th day of August, 1957, when Mr Smith arrived at the Majestic Hotel at Hot Springs, Arkansas. While he was yet at that hotel,

on August 31st, he deposited $194.84 in the Raleigh County Bank in Beckley, West Virginia, and on September 29th, while he was yet residing in that hotel, at Hot Springs, Arkansas, he deposited in the Raleigh County Bank, at Beckley, West Virginia $500.00 and again while he was yet at that hotel, he deposited on September 29th, $294.00 in the Raleigh County Bank. On the 3rd day of October, he again deposited $1[illegible]5.00 in the Raleigh County Bank and on the 12th day of October, while he was yet in said hotel, he deposited $277.09 in the Raleigh County Bank.

We submit that it is proven in this record, beyond cavil or serious dispute, that Mr. Smith has never had a domicile in the State of Arkansas.

A PRESENTATION OF THE GROUNDS UPON WHICH IT IS CONTENDED THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The grounds which disclose the substantial nature of the questions involved in this case and the rulings of the Circuit Court of Raleigh County, West Virginia, presenting these grounds and bring the case within the jurisdictional provisions relied on and within the scope of the cases cited to sustain the jurisdiction, are fully disclosed, we think, and they necessarily appear from the statement of the grounds on which the jurisdiction is invoked as stated under Subdivision (b) of Article (1) of Rule 15 of the Rules as hereinbefore stated, at pages 2 to 9 inc. We think also this material necessarily appears in the matter stated under the Subsection (c) (1) of Rule 15. Indeed, the very motion of defendant's counsel for dismissal (Transcript 187 to 191, both inclusive) is a challenge to the jurisdiction of the Supreme Court

of the United States to promulgate the principals announced by that court in Williams vs. North Carolina, 325 U. S. 226, 89 L ed 1577; the opinion of the trial court (T. 192-198) is a complete repudiation of the Williams case and a refusal to apply the principals there stated and the recitals in the order from which this appeal is prosecuted discloses a refusal to follow the Williams case and declaration of principals in conflict with the Williams case. In both applications to the Supreme Court of Appeals of West Virginia, the law as stated in Williams vs. North Carolina was urged upon that Court; the conflict of the opinion of the trial court with the law of the Williams case was twice urged upon the Supreme Court of West Virginia and twice ignored.

Furthermore, the whole fabric of our constitutional republic is, after all, founded on the sanctity of the marital relations of the citizens of this republic. The sacred institution of the home can not long endure if it is based on an elusive and fraudulent scheme of things, lending itself to the ready and easy dissolusion of the bonds of matrimony, at the whim and caprice of either party. The stability of the marital relation was of paramount concern on this continent in this respect for three hundred years before the birth of the republic and necessarily became a part of the Constitution. The sacred binding bonds of the sovereign states, constituting the republic, must of necessity be founded on stable and inspiring principals of righteousness and fair dealing with each other; each state in fairness should protect the rights of the citizens of all of the states. This can never be done with a part of the union affording an asylum for the dissolute and restless citizens who fraudulently seek a dissolution of the matrimonial bonds in a jurisdiction far removed from their homes, and in every instance at great

distance from the spouse proceeded against. If a single state can devote itself to the racket of commercial dissolution of the marital status; every state in the union is adversely affected. The dissolution of the bonds of matrimony of the citizens of this nation is a serious and solemn problem; modern criminologists attribute to the broken home the most of the fast fast accumulating criminal trusts and rackets. The Supreme Court of the United States is the single arbiterer of justice between the states, and the maintenance of principals for the maintenance of the union. It has always heretofore been the judgment of the Supreme Court which has held the states together; without this even the force of arms could not maintain the union. This case presents the simple question to this court. Shall the State of Arkansas by its enactment through its Legislature as interpreted by the court of last resort of its state, be permitted to over-ride the sovereign adjudications of the Supreme Court of the United States, interpreting the constitution of the United States and proclaiming a meaning of the law of the land at variance with the Arkansas doctrine? The instant case and the parties litigant may be soon forgotten and their injuries and wrongs suffered may be of relatively minor significance and importance, but what this court shall do with the act of the legislature of Arkansas as construed by the Circuit Court of Raleigh County, West Virginia, and the Supreme Court of Arkansas will long be remembered and the decision on this appeal will be a historical landmark on the question of legislative secession.

Respectfully Submitted.

J. W. MAXWELL
Box 469
Beckley, W. Va.

J. W. MAXWELL,
Counsel for Appellant.

APPENDIX

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

NETTIE SMITH, PLAINTIFF

VS. IN CHANCERY FINAL DECREE APPEALED FROM

HUNTER SMITH, DEFENDANT

This cause came on again this the 14th day of January, 1960, to be heard upon process duly issued, executed and returnable herein at November Rules 1958, together with a notice for suit money, temporary maintenance, and court costs, served upon the defendant at the same time and in the same manner that the process was served, the same being returnable herein on the 1st day of November, 1958; upon the proceeding had upon said notice; upon plaintiff's original bill of complaint field herein at November 1958 Rules; upon the defendant's special plea in bar, together with the exhibit and decree therein referred to, heretofore filed herein, under the direction and order of this court, as result of the proceedings had upon return of said notice for suit money and etc.; upon the amended bill of complaint of the plaintiff filed herein in open court, over the objection of the defendant, as will appear from the former orders and decrees heretofore made and entered herein; upon the answer of the defendant to plaintiff's said original and amended bill of complaint heretofore filed herein; upon the second amended and supplemental bill of complaint heretofore filed herein; upon the second amended and supplemental answer of the defendant to the plaintiff's second amended and supplemental bill of complaint, heretofore made and filed herein, over the objection of the defendant; upon the general replication of

the plaintiff to each of said answers, heretofore filed herein, and upon all of the orders, decrees, and proceedings heretofore had herein.

Now, on this the 14th day of January, 1960, the case being regularly upon the docket of the court and ready for trial, on the joint motion of counsel for the parties hereto, this cause was heard in open court, and, on this the 14th day of January, 1960, came the plaintiff in person and by her counsel, J. W. Maxwell, and came also the defendant, Hunter Smith, in person, and by his counsel, G. Berk Lynch, James M. Henderson and Edward P. Stansbury, and the plaintiff, to maintain the issue on her part, introduced and examined sundry witnesses who were duly sworn and examined in open court, and the time for evening adjournment having arrived, further proceedings in this case were recessed until the morning of January 15, 1960, at 9:00 o'clock A. M.; and now on this the 15th day of January, 1960, at 9:00 o'clock A. M., came again the same parties as heretofore, and the plaintiff to further maintain the issue on her part, introduced and examined sundry other witnesses, who were duly sworn and examined in open court, and after the plaintiff had examined all of her witnesses and introduced all of her evidence, she rested her case.

Thereupon the defendant moved the court for a decretal judgment of dismissal of the plaintiff's said bills of complaint and assigned grounds in support of his said motion, as will appear from a transcript of the proceedings had herein, on the 15th day of January, 1960, and the court having heard counsel pro and con respectfully on said motion, took the same under advise-

ment until Monday, January 18, 1960, at 9:00 o'clock A. M.

Now, on this the 18th day of January, 1960, at 9:00 o'clock A. M., came again the same parties, and the court announced his opinion and intention to sustain said motion to dismiss this action and thereupon the court proceeded to deliver from the bench, his reasons and opinion upon the matters and grounds assigned in the motion, which said opinion was at the time duly taken by the Official Court Reporter, and, on the motion of the plaintiff, to which there was no objection by defendant, the same is to be transcribed by the Official Reporter, and the same is hereby made a part of the record herein; the same to be identified with the words at the caption, "In the Circuit Court of Raleigh County, West Virginia", and followed by the style of the case, "Nettie Smith vs. In Chancery, Hunter Smith", and the words, "Ruling of the Court on the Motion to Dismiss this action", and duly signed by the presiding judge. To which rulings of the Court the plaintiff objected and excepted."

Wherefore, this court doth now here order and decree that the decree of absolute divorce between Hunter Smith and Nettie Smith, heretofore rendered by the Chancery Court of Garland County, State of Arkansas, in that certain divorce action then therein pending, styled, Hunter Smith, Plaintiff, vs. Nettie Smith, Defendant, No. "1501", entered in said court on the 12th day of November, 1957, and of record in the office of the Clerk of said Court in Chancery Record, Vol. 62, at page 12, is entitled full faith and credit by the Courts of the State of West Virginia, and it is hereby accorded full faith

and credit by the Circuit Court of this Raleigh County, West Virginia, and now the court doth further adjudge, order and decree, that the plaintiff, Nettie Smith, has failed to present any evidence of the earnings and income of the defendant, Hunter Smith, upon which the court could in anywise decree a monetary sum for the support and maintenance of the said Nettie Smith as prayed for in her said bill of complaint, to all of which rulings of the court the plaintiff, Nettie Smith, at the time objected and excepted, but the court overruled said objection and exceptions.

It is therefore, adjudged, ordered and decreed, that the plaintiff's cause of action herein be, and the same is, hereby dismissed, and that the plaintiff do pay unto the defendant his costs in and about the prosecution of his defense in this behalf expended. To which ruling of the Court the plaintiff objected and excepted.

The plaintiff expressing an intention to apply to the Supreme Court of Appeals for an appeal from and supersedeas to the foregoing decree, it is ordered that the Official Reporter of this Court proceed forthwith and within sixty (60) days, to make a complete transcript of the evidence and proceedings, heretofore had herein, in the form of an ordinary Bill of Exceptions, as if this case had been prosecuted on the Law Docket of this Court, and said transcript many hereafter be filed as a part of the record herein, and further proceedings are stayed for sixty (60) days to enable the plaintiff to have transcribed and filed herein, the complete transcript of the evidence and proceedings had herein, to be certified and filed herein and made a part of the record herein.

in all respects as provided by law, all of which is cordingly adjudged, ordered and decreed.

Enter:

/S/ Norman Knapp
J U D G E

O. K. as to form. JWM

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

NETTIE SMITH

VS. IN CHANCERY

HUNTER SMITH

OPINION OF THE COURT ON THE MOTION TO DISMISS THIS ACTION

Gentlemen, I have obviously had some difficulties with the question raised. I can't say that I have even yet arrived at a conclusion that is entirely satisfactory because of the lack of any clear-cut authority in the Courts of the State of West Virginia, but I think there are some West Virginia cases that, perhaps, lead us to what I believe Williams vs. State of North Carolina holds. Although it discusses at great length domicile, I think that Williams vs. North Carolina holds that the testing state will not give full faith and credit to the decrees of the granting state if the laws of that state are contrary to the policy in the State where tested. I come to this conclusion because I find it difficult to believe that the Federal Courts can establish a rule, or rules, in relation to matters otherwise domestic that control the domestic acts of the courts of all the states, and it seems to me that, in essence, that is what Williams vs. North Carolina finds; and it seems to me that they held that the policy of the State of North Carolina which at the time of the Williams decision, was a state in which no divorces were permitted to be granted, and there was obviously a strong state policy against divorce—that they, in effect, held that the State of North Carolina had the right to not extend full faith and credit to the decrees of another state. So, it seems to me what inquiry this Court had to make is what is the policy of the State of West

Virginia in regard to divorce decrees of states where the jurisdictional requirements are, perhaps, less strict than those of our own state. There are several cases that have been decided in which some idea of this matter can be gained, although none of them are squarely in point. I found only one, I think, since the Williams vs. North Carolina case was announced. Now, there is a case of Woodford vs. Woodford, in 111 West Virginia, at Page 116, in which our Court refused to extend full faith and credit to a decree of the State of Ohio. Now, the syllabus in that case says that a decree rendered prematurely in a sister state will not be recognized in this state under the full faith and credit provision of the federal constitution, and in that case, while the notice of publication was run in accordance with statute, the plaintiff made his or her appearance in the Ohio Court before the date stated in the notice of publication. The decree was granted before the expiration date for appearance on the part of the defendant, and for that reason, the Court said that that decree should not be recognized in this state. In passing, I might mention that it appears to me that, although the various cases don't make any distinction as to whether you are testing a divorce decree or some other kind of decree, I think in West Virginia that distinction does, in fact, exist. There is a case of Harvester Company vs. Solazo in 116 West Virginia, at Page 34; and the syllabus in that case is that "under the full faith and credit clause of the federal constitution, the Courts of this state may not refuse to enforce a judgment of another state because it involves some contravention of the public policy of this state." A divorce decree is not being construed there. I do believe, however, that in divorce cases that that won't be applied. I believe that if a divorce decree contravenes

the policy of this state, it won't be recognized by our state. There is another case of Morris vs. Morris at 113 West Virginia, 800. That was a case testing the —(Interruption by Counsel for Plaintiff.) The syllabus of that case is that "a divorce decree of a foreign jurisdiction, there procured by false testimony to jurisdictional facts, is no protection to the party guilty of that fraud on that jurisdiction." This was interesting and somewhat akin to the facts in this case because that was the decree of the State of Nevada, which is probably—it is always thought of in the same group of states as Arkansas and the four or five states where residence is for a very short period —thought of as one of those states where it is right easy to get a divorce. In that case, the Court found that it was established that the defendant was in fact in West Virginia during the period when at the time of the hearing of the cause in the Nevada Court, he swore under oath that he was in Reno, Nevada, and there was no controversy to these facts. The defendant perpetuated a fraud on the Nevada Court, and his divorce decree was set aside. A somewhat more recent case is that of Sutton vs. Sutton. I forget what it was I wanted to say about Sutton vs. Sutton. In that case, it seems to me (I think I brought it out here) to demonstrate that in that instance that the West Virginia defendant, who is the plaintiff in the decree outside the state, was simply bound on conflicting evidence to have been a resident of the sister state for the appropriate length of time. I won't say that authoratively because I don't find now what it was I thought I wanted to say about that. Perhaps, the earliest case that seems to indicate the policy in West Virginia is that of Caswell vs. Caswell, in 84 West Virginia, at Page 575, where again the syllabus holding, and I think that is the sense of the opinion also,

says, "In the absence of any showing of fraud upon the court, or lack of jurisdiction, a decree of divorce rendered by a court of competent jurisdiction in another state, duly executed pursuant to the laws of such state or territory, is entitled to the same faith and credit in the courts of this state as in the state or territory wherein rendered." That was an Oklahoma decision, where Oklahoma was either a territory or just newly a state, and here they had a very short residence requirement; and the party relying on that decree had met those residence requirements; and wherein authority was submitted and relied on from the State of New York, and our court had this to say about policy, "but the policy of our state is shown by the statute above," which is our statute having reference to full faith and credit, not the constitutional provision, but the policy of our state is shown by the statute above referred to differs from the policy of the State of New York. No lack of jurisdiction in the Oklahoma Court appearing, not in our court, but no lack of jurisdiction in the Oklahoma Court appearing, our conclusion is that the lower court properly overruled the first exception to the defendant's answer, which relied on that decree. Probably the last thing that we have, which is not exactly in point, because a much different question is presented, is that of Gardner vs. Gardner just recently decided and reported in, I guess it will be 110 S. E., 2d, Page 495, is still another instance where one relying on a decree of a foreign state, in which he sought residence and sought to establish residence in Tennessee, did so in a clearly fraudulently manner. There, as I remember, Tennessee required two years residence, and this individual finding that he could not obtain a divorce in this state simply went to Tennessee and swore that he had been a resident there for two years and purely perpetrated fraud. I think

the evidence in this case, taking all the plaintiff's evidence, which includes the depositions and the records of the residence of Mr. Smith in Arkansas, demonstrates that he was a resident there for the period required by the courts of Arkansas and by the statutes in divorce in Arkansas; that he was clearly resident there for the period required by the Arkansas statutes.

Although, these gentlemen have complained that, and have mentioned that, the plaintiff's case be denied for failure to prove the law of the foreign state, I am not too much concerned about; and I believe it is the Court's duty to look into and try to ascertain the law of Arkansas and take judicial notice of it. I didn't really do much work on that except that I found in Michie's Jurisprudence this statement that "the former rule in West Virginia was that the law, written or unwritten, of a foreign state had to be proven as a fact." That is indicated as being the former rule in West Virginia, and I take it you need not have proved as a fact the laws of the State of Arkansas in order to tie your case in. Nonetheless, I am relying primarily on the recital of the law in Wheat vs. Wheat, decided recently in Arkansas. I take it that I can look to that without any proof by either side, and that case indicates that the Arkansas statute, which provides for residence, was passed recognizing that many people will come to their state and undertake to establish a residence for divorce jurisdiction, and, if it were required that they be domiciled there, would perjure themselves; so the State of Arkansas has declared their policy to be that if one is physically present and a resident in Arkansas for the statutory time, they are also domiciled there for the purposes of Arkansas's law, and I find no fraud practiced on the court of the State of Arkansas by the de-

fendant in this case and no evidence of such. In fact, the plaintiff's evidence is as I say, for all intents and purposes that he was a resident there.

For the reason, therefore, that it appears that the State of Arkansas had jurisdiction of the person, that being Mr. Smith, and that there is no evidence of that jurisdiction having been obtained by any fraud practice by him on the State of Arkansas, and because the State of Arkansas can be presumed to know whether his residence there was temporary for the purpose of meeting the requirements of their law, he met it, and the State of Arkansas is not deceived by it, and that that decree is bona fide in the State of Arkansas, and it appearing to the Court that all of the cases that I can find which have denied full faith and credit to the decrees of other states have been found also to be faulty in that or some other particular, it seems to me that this is a valid decree of the courts of the State of Arkansas, and being valid is, therefore, entitled to full faith and credit in the courts of this state. Because I know that both parties have a considerable interest in this and the record ought to be complete, I have passed therefore on two of the grounds relied on for the motion made the other day and find against the plaintiff on the plaintiff's evidence. I think I should go the one step further and also hold that upon the prima facia case made by plaintiff, and relief prayed for could not be granted by this court in the absence of any evidence which would support a decree for the monetary portion of the prayer of plaintiff's bill. So, for those two reasons, for the reason that I believe the decrees of the State of Arkansas should be given full faith and credit in this state and for the reaso that the relief, which is the gravamen of, I think, of separate maintenance suits, could not be

granted on the evidence here, I will grant the defendant's motion.

(The above opinion was transcribed by me from my shorthand notes taken in the above styled case.)

/S/ Mary C. Meadows
(Raleigh County Circuit Court Reporter.)

/S/ Norman Knapp
Presiding Judge.

PETITIONS FOR APPEAL TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

FILING AND DISPOSAL OF FIRST REFUSAL

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th day of June, 1960, the following order was made and entered, to wit.

Nettie Smith

vs.

Hunter Smith

On a former day, to-wit, April 12, 1960, came the petitioner, Nettie Smith, by J. W. Maxwell, her attorney, and presented to the Court her petition praying for an appeal from and supersedeas to a decree of the Circuit Court of Raleigh County pronounced in this cause on the 22nd day of January, 1960, with the record therein, accompanying the petition, and note of argument in support thereof, which being seen and inspected, the appeal and supersedeas prayed for is refused by a majority of the Court. Judges Calhoun and Berry would grant.

The petition and record referred to in the foregoing order are in the words and figures as follows:

(Here follows the original petition of thirty-five pages.)

And at another day, to-wit, October 31, 1960, the following order was made and entered:

Nettie Smith

vs. **SECOND REFUSAL**

Hunter Smith

On a former day, to-wit, July 19, 1960, came again the petitioner, Nettie Smith, by J. W. Maxwell, her attorney, and presented to the Court her first and second petitions praying for an appeal from and supersedeas to a decree of the Circuit Court of Raleigh County pronounced in this cause on the 22nd day of January, 1960, with the record therein accompanying the petitions, and notes of argument in support thereof, which being seen and inspected, the appeal and supersedeas prayed for is refused by a majority of the Court on this second application. Judges Calhoun and Berry would grant.

The petition referred to in the foregoing order is in the words and figures as follows:

(Then follows the amended petition referred to, consisting of thirteen pages).

ARKANSAS STATUTE

ACT 36 — 1957

AN ACT to Amend Section 34-1208, Arkansas Statutes; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 34-1208, Arkansas Statutes, is hereby amended to read as follows:

SECTION 34-1208, MATTERS WHICH MUST BE PROVED —The plaintiff, to obtain a divorce, must prove, but need not allege, in addition to a legal cause of divorce:

FIRST: A residence in the state for sixty (60) days next before the commencement of the action, and a residence in the state for three (3) full months before the final judgment granting the decree of divorce. No decree of divorce, however, shall be granted until at least thirty (30) days have elapsed from the date of the filing of the complaint except where the grounds for divorce is willful desertion for one year without reasonable cause and continuous separation for three years without cohabitation. Where personal service cannot be had upon the defendant or where the defendant fails to enter his or her appearance in the action, no decree of divorce shall be granted the plaintiff until the said plaintiff has maintained an actual residence in the State of Arkansas for a period of not less than three (3) full months.

SECOND: That the cause of action and cause of divorce occurred or existed in this state, or if out of the State, that it was a legal cause of divorce in this State, the laws of this State to govern exclusively and independ-

ently of the laws of any other state as to the cause of divorce.

THIRD: That the cause of divorce occurred or existed within five (5) years next before the commencement of this suit.

SECTION 34-1208 (a). DEFINITION — CONSTRUCTION. The word "residence" as used in Section 34-1208 is defined to mean actual presence and upon proof of such the party alleging and offering such proof shall be considered domiciled in the State and this is declared to be the legislative intent and public policy of the State of Arkansas.

SECTION 34-1208 (b). Because it is ascertained and determined that confusion exists by reason of various conflicting decisions, particularly in **Squires vs. Squires,** 186 Arkansas 511, and **Cassen vs. Cassen,** 211 Arkansas 582, whereby many persons throughout the United States have been embarrassed and their marital status made obscure by reason of said conflicting decisions; and this Act being necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage and approval.

APPROVED: February 11, 1957

* * * * *

MEMORANDUM: This statute was construed to relieve of domicile for jurisdiction, in the case of Wheat vs. Wheat, Supra.

Murray Winters vs. People of New York, 333 U. S. 507, 92 L ed. 840.

Syl. 6. The construction of a state statute by the highest court of the state fixes its meaning for the purpose of determination of its constitutionality by the United States Supreme Court, as definitely as if it had been amended by the Legislature.

ARKANSAS DECREE OF DIVORCE

IN THE CHANCERY COURT OF GARLAND COUNTY, ARKANSAS

JUNE 1957 TERM THEREOF

AND THEREAFTER, on the 12th day of November, 1957, the same being a day of the regular term of said Court, there was present and presiding the Honorable Sam W. Garratt, Chancellor, when the following, among other proceedings, were had, to wit:

Hunter Smith ..... Plaintiff

No. 31,501 Vs. Divorce Decree

Nettie Smith ..... Defendant

On this day comes on for trial on the regular call of the calendar, the above styled cause wherein Hunter Smith is party plaintiff and Nettie Smith is party defendant, and the plaintiff appearing in person and by his Solicitors, Campbell and Campbell, Esqrs., but the defendant appearing not, and having neither filed an answer nor otherwise pleaded, is called three times at the bar of this court, and answering not said cause is ordered submitted upon the complaint, proof of publication of warning order, the affidavit therefore showing due diligence in regard to defendant's residence, report of attorney ad litem, Hon. Virgil Evans, and oral testimony.

And thereupon the Court doth hear ore tenus the evidence of three witnesses, and being fully satisfied that the defendant in apt time duly summoned herein by warning order published in the time and manner prescribed by law, and was notified of the pendency of this suit by the attorney ad litem aforesaid, and having heard all of the testimony and being fully advised in the premises of all matters of fact and law herein, finds that the

allegations of the complaint are amply sustained by the great weight of the evidence.

The Court further finds that the plaintiff has been a bona fide resident of this county and state for more than three months, and for more than two months before the suit was instituted, and his cause of divorce herein accrued within five years next before suit was filed. The Court further finds that the complaint states a valid cause of divorce under the laws of this state on the grounds of indignities to the person of plaintiff and desertion for the space of one year. That the indignities complained of consisted in part of abuse and studied neglect, calumny, manifest disdain, mental cruelty, insults, and other forms of indignities, all of which were habitually and systematically a part of defendant's behavior toward plaintiff, and as a consequence plaintiff is entitled to an absolute divorce from the defendant.

The Court further finds that the Plaintiff has been and is now contributing toward the support of the defendant the sum of $300.00 per month, and it is ordered that he continue to pay her said amount of $300.00 per month.

Upon the findings herein the Court doth consider, order, adjudge, and decree that the bonds of matrimony heretofore subsisting between plaintiff and defendant, be and the same are hereby dissolved, set aside, cancelled, annulled, and from henceforth shall be held naught, and the parties are hereby restored to all of the rights and immunities of single and unmarried persons. Plaintiff is ordered to pay defendant the sum of $300.00 per month alimony and the costs of this suit.

It is further ordered, this being a final judgment for divorce, that each party hereto be restored to all

property not disposed of at the commencement of the action, which either may have obtained from or thru the other during the marriage and in consideration or by reason thereof.

Signed this the 12 day of Novembee, A. D. 1957, and judgment rendered accordingly.

ALIMONY MODIFICATION DECREE

IN THE CHANCERY COURT OF GARLAND COUNTY ARKANSAS

DECEMBER 1958 TERM THEREOF

AND THEREAFTER, on the 7th day of January, 1959, the same being a day of the regular term of said Court, there was present and presiding the Honorable Sam W. Garratt, Chancellor, when the following, among other proceedings, were had, to-wit:

Hunter Smith ..... Plaintiff

No. 31,501 Vs. Order Modifying Decree

Nettie Smith ..... Defendant

On this day is presented to the Court the petition of the plaintiff, Hunter Smith, praying that the Court modify and amend the decree heretofore entered herein, with respect to the award of alimony in the sum of $300.00 per month. The defendant was duly notified by the attorney ad litem, Hon. Virgil Evans, whose report is on file herein, by registered U. S. Mail, at her last known address, of the pendency of plaintiff's motion for modification of the decree. On this day, namely 7th day of January, 1959, she does not appear either in person or by attorney, and no response to said motion having been filed by her, and no notice in any form or manner by her having been taken of the pendency of this suit, she is called three times at the bar of this Court, and having answered not, she is adjudged to be in default, and the Court proceeds to hear said motion upon the record and merits of the case, and doth find:

(1) That litigation was pending in the Federal Court in the State of West Virginia at the time the original decree was entered herein, and this litigation resulted

in the payment to the defendant by the plaintiff of the sum of $59,132.67 in full settlement of the judgment in that case. Plaintiff presented cancelled check, dated August 5, 1958, which was endorsed by defendant and her attorney, J. W. Maxwell, said check being certified as paid by the bank upon which it was drawn.

(2) There was also presented to the Court a document entitled "Release", signed by the defendant, Nettie Smith, and dated August 8, 1958, in which said defendant acknowledges receipt of the sum of money mentioned above, in full satisfaction of the judgment in the Federal Court.

(3) Now the award of alimony herein was based on certain commitments existing between the parties at the time of the decree. The plaintiff was paying her the sum of $300.00 per month on November 12, 1957, the date of the original decree herein, and the Court so found, and the Court further found that the plaintiff should continue to pay this amount as alimony because the plaintiff proved that same was based on some kind of contract or understanding existing between them at the time, and further for the reason that this Court found the amount of $300.00 per month alimony to be fair and reasonable, and approved the agreement as fair and reasonable.

(4) The Court now finds that the circumstances of the parties has changed and been altered by payment of the aforesaid judgment. The petitioner has approximately $60,000.00 less money and assets than he had at the time of the decree, and the amount paid his divorced wife, increases her estate by substantially a similar amount. The law is well settled that a showing of changed or altered circumstances will justify the courts

of equity in this state in amending a decree with respect to alimony.

Upon the evidence presented the Court hereby orders, adjudges and decrees that the petition for modification of the original decree with respect to alimony, herein filed by the plaintiff, Hunter Smith, being supported by the great weight of the evidence, be amended as follows, to-wit:

(1) That that part of the decree reads as follows:— "The Court further finds that the Plaintiff has been and is now contributing toward the support of the defendant the sum of $300.00 per month, and it is ordered that he continue to pay her said amount of $300.00 per month", be cancelled and held for naught, and that the plaintiff from henceforth is hereby relieved from payment of any sum or sums of alimony to the defendant. The decree for divorce as set forth in other sections and parts of the original decree remain in full force and effect.

Signed this the 7 day of January, A. D. 1959.

PROOF OF SERVICE

STATE OF WEST VIRGINIA,

COUNTY OF RALEIGH, TO-WIT:

I, Peggy Ann Adkins, stenographer and secretary in the office of J. W. Maxwell, attorney of record for Nettie Smith, Appellant, herein, depose and say that on the 11th day of March, 1961, I served a copy of the foregoing Jurisdictional Statement, addressed to the Supreme Court of the United States, in the case of Nettie Smith, Appellant, against Hunter Smith, Appellee, by delivering two copies of the same to the receptionist, secretary, and stenographer, in the office of Lynch and Henderson, counsel of record for said Hunter Smith, located at 111 Main Street, Beckley, West Virginia.

Peggy Ann Adkins

Peggy Ann Adkins

Taken, subscribed and sworn to before me at Beckley, West Virginia, this the 11th day of March, 1961.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

My commission expires 12/7/67

Robert B. Sayre

Notary Public in and for Raleigh County, West Virginia.

No. 802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ON APPEAL FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

NETTIE SMITH,
Appellant,

vs:

HUNTER SMITH,
Appellee

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

HAROLD HENKEL SMITH
Beckley, West Virginia

G. BERK LYNCH
JAMES M. HENDERSON
EDWARD P. STANSBURY
Beckley, West Virginia

Counsel for Appellee

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Supreme Court of the United States

No. 802

NETTIE SMITH,
Appellant,

vs:

HUNTER SMITH,
Appellee

MOTION TO DISMISS OR AFFIRM

For the following reasons and based upon the following facts and authorities appellee, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal of appellant on the grounds that (a) it does not present a substantial federal question, (b) the federal question sought to be reviewed was not timely or properly raised, or not expressly passed upon, and (c) the decree rests upon an adequate nonfederal basis; or in the alternative moves to affirm the decree of the Circuit Court of Raleigh County, West Virginia.

Respectfully submitted,

HAROLD HENKEL SMITH
Beckley, West Virginia

G. BERK LYNCH
JAMES M. HENDERSON
EDWARD P. STANSBURY
Beckley, West Virginia
Counsel for Appellee

DECREE AND OPINION BELOW

The opinion of the Circuit Court of Raleigh County, West Virginia, is set forth on pages 50 through 56 of the Appendix to the Jurisdictional Statement.

The decree of that Court sustaining defendant-appellee's motion to dismiss plaintiff-appellant's bill of complaint and entering decretal order in appellee's favor is set forth on pages 45 through 49 of said Appendix to the Jurisdictional Statement.

Appellant's two separate applications to the Supreme Court of Appeals of West Virginia, for an appeal from said decree, which said Supreme Court twice refused to award, are set forth on pages 57 and 58 of the Appendix to the Jurisdictional Statement.

I

STATEMENT OF THE CASE AND FACTS

This case was instituted in the Circuit Court of Raleigh County, West Virginia, on the Chancery side thereof, on October 22, 1958, when Nettie Smith, Appellant herein and plaintiff below, filed her Bill of Complaint against Hunter Smith, Appellee herein and defendant below, seeking a decree awarding to her separate maintenance and support money as the wife of the Appellee. On December 2, 1958, Appellee filed a Plea in Bar to said Bill of Complaint, supported by a duly authenticated copy of a divorce decree entered by the Chancery Court of Garland County, State of Arkansas, on November 12, 1957, which granted unto Hunter Smith a decree of absolute divorce from Nettie Smith. (Ap-

pendix - Jurisdictional Statement, pages 62-64). Subsequently, a series of Amended and Supplemental Bills of Complaint and Amended and Supplemental Answers thereto were filed by appellant and appellee, respectively. The issues were ultimately joined upon appellant's Second Amended and Supplemental Bill of Complaint, and appellee's Answer thereto and upon appellee's Plea in Bar supported by the aforesaid divorce decree.

The appellee, Hunter Smith, defended against the suit by the assertion of two propositions: that is (a) the plaintiff, Nettie Smith, was no longer the wife of Hunter Smith by virtue of the Arkansas divorce decree, and, therefore, was not entitled to any support and maintenance; and (b) Nettie Smith was guilty of desertion of Hunter Smith, and consequently was not entitled to relief.

We do not deem it necessary to set forth the facts concerning the series of marital discord incidents between appellant and appellee. Suffice it to say, that in 1943 appellant and appellee had been divorced by a decree of divorce rendered in the State of Arkansas. Subsequently, appellant and appellee were remarried in the State of Arkansas on August 18, 1953. Thereafter, they lived together as husband and wife in the City of Beckley, State of West Virginia, until on or about February 27, 1957, at which time they separated and did not thereafter resume marital relations. Subsequently, Hunter Smith, appellee herein, was granted a decree of absolute divorce from Nettie Smith by the Chancery Court of Garland County, State of Arkansas, on Novem-

ber 12, 1957, which said decree remains unappealed from and unreversed.

The divorce decree of the State of Arkansas as relied on by appellee, in addition to granting Hunter Smith an absolute divorce from Nettie Smith, also awarded to the said Nettie Smith alimony in the amount of Three Hundred Dollars ($300.00) per month.

It will be noted that appellant in the instant suit introduced no evidence in support of her allegations that alimony payments were delinquent or the sum total of any purported delinquency.

The record further shows that subsequent to the granting of the Arkansas divorce, appellant was successful in obtaining a judgment in the United States District Court for the Southern District of West Virginia, against appellee, for the sum of Fifty-eight Thousand Two Hundred Ninety-seven Dollars and Sixty-two Cents ($58,297.62), which judgment, together with interest and costs, was duly paid by appellee (Appendix - Jurisdictional Statement, pages 65-66). Thereafter, and during the pendency of the instant suit, a separate proceeding was instituted in the Chancery Court of Garland County, State of Arkansas, whereby appellee sought a modification of the Arkansas divorce decree previously awarded him, and on January 7, 1959, the Chancery Court of Garland County, State of Arkansas, modified said decree relieving appellee of the further payment of alimony to the appellant (Appendix - Jurisdictional Statement, pages 65-67).

At no time, either during the filing of voluminous pleadings, or during presentation of evidence before the Circuit Court of Raleigh County, West Virginia, did appellant plead or otherwise set forth the Arkansas jurisdictional divorce statute, which statute appears at pages 59-60 of the Appendix to the Jurisdictional Statement. Appellant likewise failed to explicitly and timely insist that said statute, as applied, was repugnant to the United States Constitution. The constitutionality of said statute was first belatedly raised by appellant on July 19, 1960, in her second application for an appeal directed to the Supreme Court of Appeals of West Virginia. This application, and the previous one, were both denied by said court. (Jurisdictional Statement, page 14).

The only complaint appellant made concerning the Arkansas divorce decree and the subsequent amending decree of that court, was that the Chancery Court of Garland County, had no jurisdiction because of the lack of domicile in the State of Arkansas, by appellee herein, for the requisite period of time. However, it will be noted that by appellant's own evidence, it was conclusively established that, not only had the parties solemnized their marriage in the State of Arkansas, but also that appellee herein had complied implicitly with the jurisdictional requirements of the Arkansas statute. He had physically and continuously resided in the State of Arkansas for the required period of sixty (60) days next before the commencement of his divorce action, and for three (3) full months next before the granting of the divorce decree.

In addition thereto, in the instant case appellant's evidence completely failed to establish the earnings and income of appellee, without which a decree for separate maintenance and support money could not be rendered in the State of West Virginia. Appellant's evidence merely demonstrated that from January 2, 1957 to January 22, 1959, appellee maintained a checking account in the Beckley National Bank, during which period of time numerous deposits and withdrawals were made by appellee and that the balance remaining therein on January 22, 1959, was Three Hundred Eighty-eight Dollars and Eighty-four Cents ($388.84). (Plaintiff-Appellant's Exhibit No. 1). Appellant's evidence also showed that appellee maintained a checking account in the Raleigh County Bank, Beckley, West Virginia, from January 14, 1957 to December 16, 1959, and that during that period of time made numerous deposits and withdrawals, and that the balance remaining therein on December 16, 1959, was One Hundred Eighty-five Dollars and Sixty-one Cents ($185.61) (Plaintiff-Appellant's Exhibit No. 2).

At the conclusion of appellant's evidence in the trial court, and when appellant had rested her case, appellee moved the court to dismiss appellant's bill of complaint and to enter a decretal judgment in his favor. The grounds assigned in support of said motion were, in substance:

(1) That appellant had failed to plead or prove the jurisdictional divorce statute of the State of Arkansas.

(2) That the evidence of appellant showed conclusively that appellee had resided in the State of Arkansas for the period required by the Arkansas statute, and that no fraud had been practiced upon the Arkansas Court.

(3) That the Circuit Court of Raleigh County, West Virginia, should accord full faith and credit to the Arkansas divorce decree.

(4) That there was no evidence adduced on behalf of appellant showing appellee's earnings and income upon which a decree for separate maintenance and support money could be based.

Taking said motion under advisement, the Circuit Court of Raleigh County, West Virginia, thereafter sustained said motion and dismissed appellant's bill of complaint and rendered a decretal judgment in favor of appellee. The oral opinion of the court was delivered from the Bench, and later transcribed and made a part of the record. The opinion in sustaining said motion was framed upon two grounds; namely, (1) The Circuit Court of Raleigh County, West Virginia, did accord full faith and credit to the Arkansas divorce decree because of appellant's evidence showing that appellee had complied implicitly with the jurisdictional requirements of the State of Arkansas, and that no fraud had been committed upon the Arkansas court by appellee; and (2) A decree for separate maintenance and support money could not be granted because of the failure

of appellant's evidence to show the earnings and income of appellee.

II

DISCUSSION OPPOSING JURISDICTION

(A) IS A SUBSTANTIAL FEDERAL QUESTION PRESENTED?

Appellant urges upon this Honorable Court the proposition that the Arkansas jurisdictional divorce statute in question is unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States. Appellant's position is premised upon the assertion that the statute in question does not meet the domiciliary requirements as contemplated by the case of WILLIAMS v. NORTH CAROLINA, 325 U. S. 226.

The Arkansas divorce statute in question requires, in substance, that the plaintiff seeking a divorce must prove a residence in the State of Arkansas for sixty (60) days next preceding the commencement of the action, and for three (3) full months before the final judgment granting the decree of divorce. The same statute defines the meaning of "residence" as being synonymous with "domicile" (Appendix - Jurisdictional Statement, pages 59-60).

A state statute defining its own construction will be given effect. 82 C.J.S., Statutes, Secs. 314-315.

In 1958, the Supreme Court of Arkansas determined the validity and constitutionality of this

statute in the case of WHEAT v. WHEAT, 318 S. W. (2d) 793. In pertinent part the court held that the statute was not unconstitutional under the full faith and credit or due process clauses of the Constitution of the United States. The opinion further indicates that the courts of other states are not compelled to accord full faith and credit to a divorce decree of the State of Arkansas but certainly permits them to do so. The courts of West Virginia will accord full faith and credit to judgments and decrees of the courts of other states where it is shown that such foreign court had jurisdiction of the subject matter and of the persons and that no fraud was committed upon the court. **Paull** v. **Cook**, 135 W. Va. 833, 65 S. E. (2d) 750; **Consumer Credit Company of Waynesburg** v. **Bowers**, 143 W. Va. 748, 104 S. E. (2d) 869.

Appellant also complains, pointing to impropriety of the substituted service upon her in the Arkansas divorce proceeding. The divorce decree demonstrates conclusively that the Arkansas statutory service requirements were strictly complied with and service properly obtained (Appendix - Jurisdictional Statement, page 62). In fact there is no contention that the provisions of the statute were not adhered to. Arkansas does not stand alone in providing for statutory substituted service of process, and it is noted that the State of West Virginia also so provides **West Virginia Code of 1955, Chapter 48, Article 2, Section 10.**

Surely, the Arkansas court had jurisdiction over the marital "res", the marriage between appellant

and appellee having been consummated in that state. Joining that fact with admitted strict compliance with the Arkansas Jurisdictional divorce statute, poses, we respectfully submit, no substantial Federal question. The statute has stood the test of time. No doubt thousands of divorces have been granted pursuant to its provisions. The public welfare of the people of this nation cannot be well served by the present belated attack upon its validity.

(B) WAS THE FEDERAL QUESTION SOUGHT TO BE REVIEWED TIMELY OR PROPERLY RAISED?

In the instant case, the Circuit Court of Raleigh County, West Virginia, entered a decree in favor of appellee and the Supreme Court of Appeals of West Virginia, although twice petitioned by appellant to review the decree, declined so to do, thus making the trial court the highest court of the state in which a decision could be had in this case. **Virginian Railway Company** v. **Mullens**, 271 U. S. 220.

Appellant now belatedly asserts that the Arkansas jurisdictional divorce statute is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the Arkansas divorce decree based thereon is not entitled to full faith and credit under the provisions of Section 1, Article IV of said Constitution. Appellee submits that neither of these questions were raised in the Circuit Court of Raleigh County, West Virginia, by proper pleading or otherwise. It is a fundamental rule of practice and procedure in West Virginia that the question

of the constitutionality of a statute must be raised specifically in the trial court. **Volume I, Michie's Jurisprudence of Virginia and West Virginia, Appeal and Error, Section** 83; **State of West Virginia** v. **Michael,** 141 W. Va. 1, 87 S. E. (2d) 595; **Hulvey** v. **Roberts,** 106 Va. 189, 55 S. E. 585.

In fact, the constitutionality of the Arkansas jurisdictional divorce statute was never mentioned by appellant at any stage of the proceeding in the trial court. It is submitted that appellant did not make the required explicit and timely insistance in the trial court that the statute as applied was repugnant to the United States Constitution. **Charleston Federal Savings and Loan Association** v. **Alderson,** 324 U. S. 182; **Raley** v. **State of Ohio,** 360 U. S. 423.

The United States Supreme Court recognizes and follows the law of the state courts in respect to the manner and timeliness of the presentation of questions for review. **Stembridge** v. **State of Georgia,** 343 U. S. 541.

Therefore, it is respectfully submitted that the purported "constitutional" question was neither properly nor timely raised by this appellant.

(C) WAS THE FEDERAL QUESTION SOUGHT TO BE REVIEWED EXPRESSLY PASSED ON?

The purported Federal questions never having been explicitly and timely presented to the trial court were, of necessity, not passed upon by that

court. Appellant's applications to the Supreme Court of Appeals of West Virginia having been twice denied, the purported Federal questions necessarily were not passed upon by that court.

(D) DOES THE JUDGMENT OF THE LOWER COURT REST UPON AN ADEQUATE NONFEDERAL BASIS?

In addition to its holding that the Arkansas divorce decree was entitled to full faith and credit in West Virginia, the Circuit Court of Raleigh County, West Virginia, by its decree also specifically held that there was no evidence adduced on behalf of appellant upon which to bottom a monetary award for support and maintenance against the appellee. Patently, this finding was based upon the total lack of evidence tending to show earnings and income of appellee out of which support or maintenance money could be paid.

In the State of West Virginia, the authorities are uniform in holding that support and maintenance allowance can only be based upon earnings and income as required by the West Virginia statute (**Jurisdictional Statement, Footnote (2), page 3**); **Davis** v. **Davis,** 137 W. Va. 213, at pages 220-221, 70 S. E. (2d) 889; **Wolford** v. **Wolford,** 133 W. Va. 403, at page 41[illegible]56 S. E. (2d) 614.

The presentation of the checking account records of two banks in Beckley, West Virginia, showing deposits and withdrawals of Hunter Smith over a period of several months, is entirely inadequate to

sustain the required burden of proof. There was no showing as to what portions of the several deposits represented income; what portions of the withdrawals were for business expenses, and consequently no showing of the amount of net earnings or income, if indeed there were any at all, which remained for the depositor. In point of fact, the only single fact established by those records was that after a series of deposits and withdrawals, Hunter Smith had the sum of Three Hundred Eighty-eight Dollars and Eighty-four Cents ($388.84) in one bank, and One Hundred Eighty-five Dollars and Sixty-one Cents ($185.61) in the other. Obviously, no intelligent award could have been based upon such meager evidence, even if the appellant's cause of action had not been otherwise completely barred by the Arkansas divorce.

It is respectfully submitted that the Circuit Court of Raleigh County, that being the highest state court in which a decision could be had in this case based its decree, in part, expressly upon a substantial and sufficient nonfederal ground, and the Supreme Court of the United States should not take jurisdiction to review the decree. **Black** v. **Cutter Laboratories**, 351 U. S. 292; **Durley** v. **Mayo**, 351 U. S. 277.

III

CONCLUSION

For the foregoing reasons, it is respectfully submitted that appellee's motion should be sustained, and that the Supreme Court of the United States should refuse to take jurisdiction of this appeal.

Respectfully submitted,

HAROLD HENKEL SMITH
Beckley, West Virginia

G. BERK LYNCH
JAMES M. HENDERSON
EDWARD P. STANSBURY
Beckley, West Virginia

Counsel for Appellee

PROOF OF SERVICE

STATE OF WEST VIRGINIA,

COUNTY OF RALEIGH, TO-WIT:

I, JOYCE SWEENEY, Stenographer and Secretary in the Offices of G. Berk Lynch and James M. Henderson, partners practicing law under the name of Lynch & Henderson, counsel of record for Hunter Smith, appellee, herein, depose and say that on the 4th day of April, 1961, I served two (2) copies of the foregoing Motion to Dismiss or Affirm, addressed to the Supreme Court of the United States in the case of Nettie Smith, appellant, against Hunter Smith, appellee, by delivering the same to the Secretary and Stenographer in the Office of J. W. Maxwell, counsel of record for Nettie Smith, located in The Raleigh County Bank Building, Beckley, West Virginia.

Joyce Sweeney

Taken, subscribed and sworn to before me in Beckley, West Virginia, this the 4th day of April, 1961, and in witness whereof, I have hereunto set my hand and official seal.

My commission expires:

Notary Public in and for Raleigh County, West Virginia.

(Notarial Seal)

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 14 1961
JAMES R. BROWNING, Clerk

NO. 802

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

NETTIE SMITH, APPELLANT

VS.

HUNTER SMITH, APPELLEE

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

J. W. MAXWELL

Counsel for Appellant

NO. 802

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

NETTIE SMITH, APPELLANT

VS.

HUNTER SMITH, APPELLEE

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The appellant presents this short memorandum in opposition to the motion to dismiss or affirm. This opposition statement is presented primarily to meet certain statements of fact which we deem to have been erroneously stated in the appellee's motion.

We shall only attempt to meet these matters in the chronological order as they appear in the brief of the appellee.

DEFAULT OF ALIMONY PAYMENTS: At page 4 of the Motion to Dismiss, this statement appears:

> "It will be noted that appellant in the instant suit introduced no evidence in support of her allegations that alimony payments were delinquent or the sum total of any purported delinquency."

(a) We respectfully direct the court's attention to the statements contained in our Jurisdictional Statement on this question, we shall not repeat.

(b) We assert that the transcript of the testimony will disclose that the appellant in her testimony testified both in support of her allegations that alimony payments were delinquent and that there was then accrued delinquency. Furthermore, upon the filing of the alleged Arkansas divorce decree in the Circuit Court of Raleigh County, West Virginia, an amended bill was filed and thereafter a second amended bill was filed and from both of these bills it is clearly disclosed by the allegations of the last amended bill and undenied by the answer, that there is default in the payment of adjudged alimony and claim asserted for its recovery in this suit, i.e., to have a decree in the present West Virginia suit carrying into effect the Arkansas judgments, which the appellant claims to be a voluntary consent decree entered in the court of competent jurisdiction at the behest of the appellee and binding on him as any other consent judgment would bind. (1)

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(1) The Arkansas Statute — 1947 — Official Edition, Vol. 1, Section 34-1201, vests jurisdiction in the Chancery Courts of Arkansas in this Language:

"The *action for alimony*, or divorce shall be by equitable proceedings". (Emphasis mine)

Thus, the Chancery Court of Garland County had jurisdiction of the subject matter, (1) alimony and (2) the person of appellee, and having such jurisdiction at the instances of the appellee; the Court entered a consent decree for alimony. For the adjudication of Alimony Domicile was wholly unnecessary. For divorce domicile was essential to the jurisdiction of the court. The two subjects are treated in the disjunctive under the Arkansas statute.

It is indeed difficult to understand, in the light of the record and the brief filed, why counsel should make the statement, "No evidence in support of her allegations that alimony payments were delinquent," etc. We vouch that there is both, evidence and undenied pleaded allegations to sustain the delinquency in payment.

11

THE FEDERAL QUESTION WAS RAISED AT THE TRIAL: At page 10 of the Motion to Dismiss or Affirm, the appellee says:

> "Appellant now belatedly asserts that the Arkansas jurisdictional divorce statute is violative of Section I of the Fourteenth Amendment to the Constitution of the United States, and that the Arkansas divorce decree based thereon is not entitled to full faith and credit under the provisions of Section I, Article IV of said Constitution. Appellee submits that neither of these questions were raised in the Circuit Court of Raleigh County, West Virginia, by proper pleading or otherwise, * * * * * *"

And again on page eleven:

> **"In fact, the constitutionality of the Arkansas jurisdictional divorce statute was never mentioned by appellant at any stage of the proceeding in the trial court.** It is submitted that appellant did not make the required explicit and timely insistance in the trial court that the statute as applied was repugnant to the United States Constitution. * * * *" (Emphasis mine)

If these statements of fact be true, it is indeed hard to understand why the opinion of the Circuit Court of

Raleigh County, West Virginia, as disclosed in our Appendix, pages 50 to 56, attacks the opinion of the Supreme Court of the United States in Williams vs. North Carolina; why should he speak of that case at all? Indeed, at the very inception of the trial court's opinion he addresses himself to the identical question of the legality of the Arkansas decree and he relies explicitly on the Arkansas Statute and bases his decision on the Arkansas Statute and Wheat vs. Wheat, construing that statute. In this connection, we direct the Court's attention to the motion of appellee appearing on pages 15 to 18 of our statement on the jurisdiction.

The Circuit Court of Raleigh County, West Virginia, thus sustained the Arkansas Statute, there was no reason for the appellant to attack that Statute. In both of her bills, the appellant had attacked the divorce decree as void for want of domicile to support it and as having been obtained fraudulently and to meet this allegation the appellee himself pleaded and urged upon the Court the void Arkansas Statute, in this he was sustained. It is from this holding this appeal is prosecuted. At the first opportunity, after that statute was so held to be valid, it was attack in the State Supreme Court of West Virginia, as will appear from the allegations of the petition for appeal and supersedeas to the Supreme Court of Appeals of West Virginia, which is in the certified record.

Up to the time of that opinion by the trial court, the plaintiff had interposed as a defense only (a) "The plaintiff, Nettie Smith, was no longer the wife of Hunter Smith by virtue of the Arkansas divorce decree" (b) "That Nettie Smith was guilty of desertion of Hun

ter Smith and consequently was not entitled to relief". This is the only defense set up. The prayer of the bill sought to set aside said divorce and to declare it null and void, the trial court sustained the statute and the decree attacked.

At page 17 Mr. Henderson says:

> "Judge Maxwell, in his theory of the case, has proceeded on domicile. The case of Wheat vs. Wheat expressly distinguishes between domicile and residence, * * * *".

If the validity of the statute was not raised why this statement? Furthermore, let us bear in mind that the above quoted statements of fact are made in the face of the statements of the final decree appealed from. (See our Appendix page 45) Embodied in that decree is the record proof of the questions raised before the trial judge, "the Court having heard counsel pro and con respectively on said motion", then necessarily held against the necessity of domicile as urged by counsel for appellant, as clearly understood by counsel for appellee. The decree proceeds at page 47 to hold the divorce granted under that statute to be valid and binding; this, the appellant in her amended bill of complaint, had challenged as void, for the want of domicile of the plaintiff in Arkansas. The trial court granted full faith and credit to that Arkansas decree, notwithstanding, the decisions of the Supreme Court of the United States in the case of Williams vs. North Carolina, as presented and urged upon the trial court by counsel for appellant as above disclosed and as disclosed by the very verbage of the opinion of the trial court.

THE JUDGMENT APPEALED FROM DOES NOT REST UPON ADEQUATE NON FEDERAL BASIS: In support of the affirmative of the above question, the appellee urges the procedural question decided by the trial court, wherein the trial court, in its decree, said:

> "The plaintiff, Nettie Smith, has failed to present any evidence of earnings and income of the defendant, Hunter Smith, upon which the court could in anywise decree a monetary sum of the support and maintenance of the said Nettie Smith as prayed for in her said bill of complaint".

This, counsel for appellee, urge is the adequate non federal basis for the decision of the trial court. This procedural question, they say, defeats the attack on the divorce statute of Arkansas. A mere statement of the question refutes the assertion. This relief was secondary relief as evidenced by the prayer of the plaintiff's amended bill of complaint. Her bill seeks to have the voluntary confessed awards made by the Arkansas Court, adjudged to her or, in the alternative, an adequate award and she sought also the maintenance of her marital relation. The latter having become the chief issue presented.

We anticipated this position and covered it rather thoroughly in our statement on the jurisdictional question. We shall not repeat what we said there. Suffice it to say, this was an afterthought of counsel and the court. The more momentous constitutional questions and plaintiff's marital status had claimed the attention of the court. The decisions of those questions preceded the decision of this secondary question. Furthermore, the

statement of the court in the decree has not a scintilla of basis in fact on which to rest. The statement of the trial court in this regard is neither supported by the facts in the case, nor the law of the State of West Virginia. We cover the facts in our previous statement. Illustrative of the law of the State of West Virginia on this question is the very interesting case of **Goff vs. Goff**, 60 W. Va. 9, 53 S. E. 769. The second point of the syllabus of which is as follows:

> 2. Same — Permanent Alimony.
>
> Permanent alimony decreed in a fixed annual sum, the defendant appearing in the case or served with process, is a personal decree and a lien on his land, though such alimony be payable in installments in the future.

It would serve no good purpose to discuss this question on this jurisdictional question. Suffice it to say, that the decree of this court of chancery in the instant case is indeed a frail statement of the boasted equity maximums, chief of which is, "where the law affords a right, it will afford a remedy for its enforcement". (2) Surely the law of West Virginia affording separate maintenance for the wife does not make it available to the wife, only upon her discovery of the fund from which it is to be

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(2) In our Jurisdictional Statement on page 3 we cited authorities on the right involved, however, we cited Snyder vs. Lane as reported in 63 S. E., this was error, it should have been 65 S. E. 483.

paid. Such a principle reduces courts of equity to a helpless status. Surely, the jurisdiction of the Supreme Court of the United States is not so easily defeated.

Respectfully submitted.

J. W. MAXWELL,
Counsel for Appellant.

J. W. MAXWELL
BOX 469
BECKLEY, WEST VIRGINIA

PROOF OF SERVICE

STATE OF WEST VIRGINIA,
COUNTY OF RALEIGH, TO-WIT:

I, Peggy Ann Adkins, stenographer and secretary in the office of J. W. Maxwell, attorney of record for Nettie Smith, Appellant, herein, depose and say that on the 11th day of April, 1961, I served a copy of the foregoing Brief of Appellant in Opposition to Motion to Dismiss or Affirm, addressed to the Supreme Court of the United States, in the case of Nettie Smith, Appellant, against Hunter Smith, Appellee, by delivering four copies of the same to the receptionist, secretary, and stenographer, in the office of Lynch and Henderson, counsel of record for said Hunter Smith, located at 111 Main Street, Beckley, West Virginia.

Peggy Ann Adkins

Taken, subscribed and sworn to before me at Beckley, West Virginia, this the 11th day of April, 1961.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

My commission expires. 4/8/67

Notary Public in and for
Raleigh County, West Virginia.